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EDITOR'S NOTE

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ugust 1, 1985

Title: J. B. Stringfellow, Jr., et al., Petitioners
v.
Concerned Neighbors in Action, et al.

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Mulliken, David L.

Counsel for respondent: Wood, Frederic D., Solicitor General

try	Date	Note	Proceedings and Orders
1	May 29 1985		Application for extension of time to file petition and order granting same until August 1, 1985 (Rehnquist, May 30, 1985).
2	Aug 1 1985	G	Petition for writ of certiorari filed.
4	Aug 12 1985		Order extending time to file response to petition until October 31, 1985.
5	Oct 10 1985		Order further extending time to file response to petition until December 30, 1985.
6	Dec 11 1985		Order further extending time to file response to petition until February 28, 1986.
7	Feb 10 1986		Order further extending time to file response to petition until April 29, 1986.
8	Apr 2 1986		Supplemental brief of petitioners J. Stringfellow, et al. filed.
9	Apr 11 1986		Order further extending time to file response to petition until May 12, 1986.
0	Apr 11 1986		The above extension applies to all respondents.
1	May 7 1986		Brief of respondent United States in opposition filed.
2	May 13 1986		DISTRIBUTED. May 29, 1986
3	May 12 1986	X	Brief of respondents Concerned Neighbors In Action, et al. in opposition filed.
4	Jun 2 1986		Petition GRANTED. Limited to Question 1 presented by the petition.
			**********
5	May 19 1986		Lodging received.
8	Jul 11 1986		Order extending time to file brief of petitioner on the merits until July 31, 1986.
9	Jul 30 1986		Record filed.
0	Jul 30 1986		Certified copy of original record and proceedings (Box) received.
1	Jul 31 1986		Joint appendix filed.
2	Jul 31 1986		Brief of petitioners J. Stringfellow, et al. filed.
3	Jul 31 1986		Brief of respondent United States supporting petitioner filed.
4	Jul 28 1986		Motion to dismiss writ of certiorari as to petitioners Alumax Inc. and Hunter Engineering Inc. only and order of dismissal pursuant to Rule 53 of this Court. (8/12/86).
5	Aug 12 1986	G	Motion of the Solicitor General for divided argument

PETITION FOR WRIT OF CERTIORARI

No. 85-184

Supreme Court, U.S.
FILED
AUG 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

J. B STRINGFELLOW, JR.; STRINGFELLOW QUARRY COMPANY; STRINGFELLOW QUARRY COMPANY, INC.; ALUMAX INC.; BKK CORPORATION; MONTROSE CHEMICAL CORPORATION OF CALIFORNIA; NORTHROP CORPORATION; THE DEUTSCH COMPANY; POST TRANSPORTATION CO.; RAINBOW CANYON MANUFACTURING CORP.; RHEEM MANUFACTURING CO.; ROCKWELL INTERNATIONAL CORP.; ROHR INDUSTRIES, INC.; and WEYERHAEUSER CO.,
Petitioners,

vs.

CONCERNED NEIGHBORS IN ACTION and PENNY NEWMAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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July 30, 1985 **Counsel of Record for Petitioners*

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100p

QUESTIONS PRESENTED FOR REVIEW

1. Is an order granting permissive intervention but denying intervention as of right immediately appealable?

2. Did the Ninth Circuit err in reversing the district court's holding that Intervenors, an individual and a corporation, could intervene permissively but not as of right in this action in which the United States and the State of California seek relief concerning the clean-up of a waste disposal site?

PARTIES BELOW

Plaintiffs-Appellees:

United States of America
State of California

Defendant-Appellees:

J.B. Stringfellow, Jr.
Stringfellow Quarry Co., Inc.
Stringfellow Quarry Company
Paul Hubbs
Lucille Hubbs
E. Moe McCook
Alcan Aluminum Corp.
Alumax, Inc.
BKK Corporation
Capri Pumping Service
General Electric Co.
General Steel and Wire Co.
Hunter Engineering, Inc.
McDonnell Douglas Corp.
Montrose Chemical Corporation of California
National Distillers & Chemical Corp.
NI Industries, Inc.
Northrop Corporation
The Deutsch Company

(Continued on next page)

Quemetco, Inc.
Rainbow Canyon Manufacturing Corp.
Rheem Manufacturing Co.
Rockwell International Corp.
Rohr Industries, Inc.
Standard Dredging Corp.
Stauffer Chemical Co.
Weyerhaeuser Co.
Wileman's Cesspool Service

Intervenors-Appellants:

Concerned Neighbors in Action
Penny Newman

A list of the subsidiaries and affiliates of each of the corporate petitioners is set forth in the Appendix.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

J. B STRINGFELLOW, JR.; STRINGFELLOW QUARRY COMPANY; STRINGFELLOW QUARRY COMPANY, INC.; ALUMAX INC.; BKK CORPORATION; MONTROSE CHEMICAL CORPORATION OF CALIFORNIA; NORTHROP CORPORATION; THE DEUTSCH COMPANY; POST TRANSPORTATION CO.; RAINBOW CANYON MANUFACTURING CORP.; RHEEM MANUFACTURING CO.; ROCKWELL INTERNATIONAL CORP.; ROHR INDUSTRIES, INC.; and WEYERHAEUSER CO.,

Petitioners,

vs.

CONCERNED NEIGHBORS IN ACTION and PENNY NEWMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 18, 1985.

OPINIONS BELOW

The first opinion of the Ninth Circuit, entered June 4, 1984, was reported in the advance sheets of the Federal Reporter at 734 F.2d 436 (9th Cir. 1984) but was withdrawn before publication of the permanent bound edition of such reporter. That opinion is reported unofficially at 20 Env't Rep. (BNA) 2233 (9th Cir. 1984).

A second opinion of the Ninth Circuit, entered on September 6, 1984, after rehearing, is a memorandum decision, reported unofficially at 21 Env't Rep. (BNA) 2046 (9th Cir. 1984).

The Ninth Circuit's order reversing in part, vacating in part and remanding to the District Court, entered March 18, 1985, is reported at 755 F.2d 1383 (9th Cir. 1985). The order states that an opinion explaining the reasons for the March 18, 1985 order "will follow;" that opinion has not yet been issued.

The District Court's Order Granting Leave to Intervene is reported unofficially at 20 Env't Rep. (BNA) 1659 (C.D. Cal. 1984).

The various opinions and orders of the Court of Appeals, and the District Court's Order Granting Leave to Intervene, are reproduced in their entirety in the Appendix hereto.

JURISDICTION

The Ninth Circuit's initial opinion granting petitioners' motion to dismiss the appeal for want of jurisdiction was entered June 4, 1984. Upon reconsideration, the Ninth Circuit withdrew its initial opinion and entered its September 6, 1984 decision. A Petition for Reconsideration

and Suggestion For Reconsideration *En Banc* was filed by petitioners on September 20, 1984. The Ninth Circuit denied such petition by order entered October 26, 1984. After briefing on the merits, the Ninth Circuit, on March 18, 1985, entered its judgment in the form of a *per curiam* order which stated that its "opinion will follow." Petitioners seek review of the March 18, 1985 judgment.[1] By an order entered on May 30, 1985 (Order No. A-907), Justice Rehnquist extended the time for filing a petition for writ of certiorari in this matter to and including August 1, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. 28 U.S.C. § 1291
2. 28 U.S.C. § 1292
3. Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"):
   § 104(a)(1), 42 U.S.C. § 9604(a)(1)
   § 106(a), 42 U.S.C. § 9606(a)
   § 107(a), 42 U.S.C. § 9607(a)
4. Federal Rules of Civil Procedure,
   Rule 24

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[1]Petitioners seek review of both the merits of the March 18, 1985 judgment and the decision of the Ninth Circuit that it had jurisdiction to hear Intervenors' appeal. Although the Ninth Circuit addressed the jurisdictional issue in its September 6, 1984 opinion, the jurisdictional issued is properly presented in this petition because the September 6, 1984 opinion was not a final "judgment" under 28 U.S.C. § 2101(c) and because the Ninth Circuit, by entering its March 18, 1985 decision, obviously rejected the jurisdictional arguments contained in the brief on the merits filed by petitioners in the Ninth Circuit.

5. Federal Water Pollution Control Act (the "Clean Water Act" or "CWA"):
   § 311(c)(1), 33 U.S.C. § 1321(c)(1)
   § 504(a), 33 U.S.C. § 1364(a)
   § 505, 33 U.S.C. § 1365
6. Resource Conservation and Recovery Act ("RCRA"):
   § 7002, 42 U.S.C. § 6972
   § 7003(a), 42 U.S.C. § 6973(a)
7. Safe Drinking Water Act("SDWA"):
   § 1431(a), 42 U.S.C. § 300i(a)
   § 1449, 42 U.S.C. § 300j-8
8. Cal. Health & Safety Code
   § 25358.3

STATEMENT OF THE CASE

The action underlying this petition was commenced in April 1983 by the United States of America and the State of California (collectively, the "Governmental Plaintiffs") in the United States District Court for the Central District of California to assert claims respecting the clean-up of the Stringfellow waste disposal site located near Glen Avon, California. Among the more than thirty original defendants named in the action are the former owners of the Stringfellow site, persons who allegedly transported materials to the site and persons who allegedly generated materials which were disposed of at the site. More than 100 additional entities have been named as third party defendants. Jurisdiction in the District Court was asserted

under 28 U.S.C. §§ 1331, 1345 and 42 U.S.C. §§ 300i, 1321(b)(2), 1331, 1364, 6973, 9613(b).

Five of the Governmental Plaintiffs' claims for relief against defendants are asserted under the so-called "emergency relief" or "substantial endangerment" provisions of four separate federal statutes and one state statute.[2] These five claims (the "Emergency Relief Claims") seek injunctive relief with respect to alleged endangerments to the environment in and around the Stringfellow site. The Governmental Plaintiffs also have asserted four claims under the cost recovery provisions of various federal and state statutes.[3] Such claims (the "Cost Recovery Claims") seek recovery of funds already expended and to be expended in the future for the clean-up of the Stringfellow site. The Governmental Plaintiffs also assert that the Stringfellow site is a public nuisance under state law.

In July of 1983, Concerned Neighbors in Action, a corporation, and Penny Newman (collectively,

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[2]The Governmental Plaintiffs' First Claim for Relief is asserted under Section 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9606(a). The Third Claim for Relief is asserted under Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973. The Fourth Claim for Relief is asserted under Section 504 of the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. § 1364. The Sixth Claim for Relief is asserted under Section 1431(a) of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300i(a). The Eleventh Claim for Relief is asserted under Cal. Health & Safety Code § 25358.3. These and other relevant statutes are reproduced in the appendix hereto.

[3]The Governmental Plaintiffs' Second, Fifth, Seventh and Eighth Claims for Relief are based upon the following four statutes: Sections 104 and 107(a) of CERCLA, 42 U.S.C. §§ 9604, 9707(a); Section 311 of the Clean Water Act, 33 U.S.C. § 1321; Section 107 of the CERCLA, 42 U.S.C. § 9607; and Cal. Health & Safety Code § 25300-25395.

"Intervenors") petitioned the District Court for leave to intervene as of right under Fed. R. Civ. P. 24 (a) and/or permissively under Fed. R. Civ. P. 24(b). Intervenors' proposed Complaint in Intervention asserted nine claims that were virtually identical to the Governmental Plaintiffs' Emergency Relief and Cost Recovery Claims. In addition, the proposed Complaint in Intervention asserted eight new claims, consisting of claims for personal injury and other individualized damages and "claims in intervention" purportedly advanced under the citizen suit provisions of three federal statutes.[4]

By its Order Granting Leave to Intervene (the "Order"), entered on February 17, 1984, the District Court held that Intervenors were not entitled to intervene as of right but granted Intervenors leave to intervene permissively under Fed. R. Civ. P. 24(b). The Order specifically allowed Intervenors to advance claims in intervention with respect to all of the Governmental Plaintiffs' claims in which intervention was sought, except the Cost Recovery Claims.[5] However, the Order prohibited Intervenors from asserting "their individualized damage and other claims." Slip op. at 28. This limitation was imposed because the court found that "allowing applicants to assert their individualized damage and other claims would burden and expand an

[4]"Claims in intervention" were asserted under Section 505 of the Clean Water Act, 33 U.S.C. § 1365; Section 7002 of RCRA, 42 U.S.C. § 6972; and Section 1449 of SDWA, 42 U.S.C. § 300j-8.

[5]The District Court found that Intervenors' only interests in advancing Cost Recovery Claims were their interests as taxpayers, and were thus insufficient to give standing to pursue such claims. Intervenors did not address this part of the District Court's holding in their appeal to the Ninth Circuit and presumably have abandoned their arguments that they should be entitled to pursue such claims.

already complex litigation and could jeopardize the possibility of settlement." *Id.*

In an effort "to minimize delay and confusion involved in discovery in this large, complex case," the Order also required Intervenors to meet and confer with all parties and obtain the concurrence of at least one other party before initiating discovery or motions. Slip op. at 19. However, the Order confirmed that Intervenors, as parties, "shall have the right to attend all other depositions and to participate to an extent not duplicative of the original parties, and to receive copies of all discovery to the same extent as any other party herein." *Id.*

Pursuant to the Order, Intervenors filed a modified Complaint in Intervention on or about July 24, 1984, and are now parties to the ongoing District Court action.

After filing the Complaint in Intervention, Intervenor Newman and approximately 5074 other residents of the Glen Avon area[6] commenced an action in the Riverside County Superior Court of the State of California asserting claims against more than 100 defendants (including all of the original defendants in this proceeding) for damages and other relief relating to the Stringfellow site. Intervenors' state court complaint purports to assert causes of action for negligence, strict products liability, strict liability for ultrahazardous activity, breach of warranty, intentional infliction of emotional distress, trespass, nuisance, misrepresentation, inverse condemnation and maintenance of a dangerous condition.

[6]Intervenor Concerned Neighbors In Action purports to represent more than 400 residents of Glen Avon, California, many or all of whom are presumably plaintiffs in the Riverside County Superior Court action.

Notwithstanding the grant of leave to intervene and the actual filing of their Complaint in Intervention, Intervenors immediately filed a notice of appeal to seek appellate review of the Order by the United States Court of Appeals for the Ninth Circuit. The Governmental Plaintiffs and defendants moved to dismiss the appeal on the grounds that the Order was not a final and appealable order. In an opinion dated June 4, 1984 and originally reported at 734 F.2d 436 (9th Cir. 1984), the Ninth Circuit, relying upon decisions from this Court and from three other circuits, held that the Order was not immediately appealable and dismissed the appeal.

On September 6, 1984, however, the Ninth Circuit withdrew its initial opinion in response to Intervenors' petition for rehearing which asserted that the court's opinion was inconsistent with *State of California v. Block*, 690 F.2d 753 (9th Cir. 1982). In the September 6, 1984 opinion, the court, without elaboration, held simply that *Block* was controlling and that "[d]enial of intervention as of right is a final appealable order, despite the grant of permissive intervention." A Petition for Reconsideration and Suggestion for Reconsideration *En Banc* was denied by the Ninth Circuit on October 26, 1984.[7]

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[7]On December 20, 1984, Petitioners filed with this Court a Petition for a Writ of Certiorari seeking review of the Ninth Circuit's September 6, 1984 decision. The petition, which was assigned Case No. 84-999, was filed in accordance with 28 U.S.C. §§ 1254(1), 2101(e) and Supreme Court Rule 18 and sought this Court's review of the jurisdictional issue before final judgment in the Ninth Circuit. Pursuant to Rule 29.3 of the Rules of this Court, the Solicitor General requested and received an extension of time to March 22, 1985 to file a brief in response to the petition. Before the expiration of the extension of time, the Ninth Circuit entered its March 18, 1985 judgment, thereby mooting petitioner's desire of obtaining pre-judgment review of the jurisdictional issue. Accordingly, petitioners moved for voluntary dismissal of the petition to allow

After briefing on the merits and oral argument, the Ninth Circuit entered its judgment in the form of the March 18, 1985 *per curiam* order. That order reversed the District Court's denial of intervention as of right, vacated the grant of leave to intervene permissively and remanded the action to the District Court for further proceedings. The Ninth Circuit's March 18, 1985 order does not give any reasons for the decision but states that "[a]n opinion will follow." The Ninth Circuit's opinion still has not been issued.

Shortly before the time for filing a petition for writ of certiorari to seek review of the March 18, 1985 judgment was set to expire, petitioners submitted to Justice Rehnquist an application for an extension of time to file such a petition. The application was submitted on the grounds that under the existing circumstances — where the Ninth Circuit has entered its judgment but has delayed the issuance of its opinion — it would be difficult for petitioners to draft, and nearly impossible for this Court to consider meaningfully, a petition for certiorari seeking review of the merits of the March 18, 1985 judgment. On May 30, 1985, Justice Rehnquist granted an extension of time for filing such a petition to and including August 1, 1985.

Inasmuch as the extension of time granted by Justice Rehnquist is about to expire and the Ninth Circuit still has not issued its opinion, petitioners are filing this petition for certiorari based upon the record now available. Petitioners respectfully submit that the Ninth Circuit's jurisdictional

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them to file the present petition which seeks review of both the jurisdictional issue and the Ninth Circuit's decision on the merits. The Court, on May 1, 1985, dismissed the petition in case No. 84-999 pursuant to Rule 53.

analysis justifies the immediate issuance of the requested writ. Meaningful consideration of the second issue presented by this petition (relating to the merits of the Ninth Circuit's March 18, 1985 judgment) may not be possible until the Ninth Circuit issues its opinion. Thus Petitioners respectfully request that this Court not act upon this petition until after the Ninth Circuit issues its opinion. Petitioners further respectfully request leave to amend this petition or to file supplemental briefing once the Ninth Circuit's opinion is issued.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for certiorari to resolve the conflicts created by the Ninth Circuit's jurisdictional analysis and its decision on the merits.

The reasoning and holding of the Ninth Circuit that it has jurisdiction to hear an immediate appeal from an order granting permissive intervention but denying intervention as of right is in conflict with the standards governing appeals of intervention and other interlocutory orders, established in a series of decisions by this Court. In addition, the decision of the Ninth Circuit directly conflicts with three other decisions on the same issue rendered by three different Courts of Appeals. Given the inconsistency between the decision of the Ninth Circuit in this case and the decisions of this Court, petitioners respectfully submit that it is appropriate for this Court to reverse or vacate summarily under Rule 23.

While little can be said of the legal analysis of the Ninth Circuit's decision on the merits pending issuance of its opinion, the result reached by the Ninth Circuit in this case — a determination that Intervenors are entitled to intervene

as of right in this "emergency relief" action — is in conflict with a recent decision of the Second Circuit. The result reached by the Ninth Circuit under the facts of this case also suggests that the Ninth Circuit departed from the legal standards applied by this Court and by various circuit Courts of Appeals in appeals from intervention orders.

Accordingly, this Court should grant a writ of certiorari to review and resolve the conflicts created by the Ninth Circuit's holdings on jurisdiction and on the merits.

1. THE JURISDICTIONAL DECISION BELOW IS CONTRARY TO DECISIONS OF THIS COURT

The jurisdictional decision of the Ninth Circuit is in conflict with this Court's interpretation and application of the so-called "final judgment" and "collateral order" doctrines of 28 U.S.C. § 1291 because it allows intervenors to appeal immediately from orders granting intervention even though such intervenors also have a right of appeal upon final disposition of a case.

The "final judgment" standard of 28 U.S.C. § 1291 has repeatedly been applied by this Court to avoid multiple and "piecemeal appeals" arising from the component elements of the same dispute. *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978) (appeal of order denying class certification dismissed). Such decisions curtail "the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

In 1947, this Court, in *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519 (1947), specifically applied the final judgment standard to orders respecting intervention and established a series of rules concerning the jurisdiction of appellate courts to review intervention orders. In allowing an appeal where a putative intervenor as of right was not permitted in any respect to became a party to the underlying action, this Court opined that orders denying permissive intervention are not immediately reviewable because a permissive intervenor "is at liberty to assert and protect his interests in some more appropriate proceeding" while orders denying intervention altogether where an absolute right to intervene has been claimed are appealable "since [the applicant] cannot appeal from any subsequent order or judgment in the proceeding." 331 U.S. at 524. In short, *Brotherhood of Railroad Trainmen* establishes that an intervention order is immediately appealable under 28 U.S.C. § 1291 only if the intervenor is not able to protect its rights in some other fashion, such as an "appeal from a subsequent order or judgment." 331 U.S. at 524.

The Ninth Circuit's decision allowing an immediate appeal of an order granting permissive intervention but denying intervention as of right is at-odds with *Brotherhood of Railroad Trainmen* and the "final judgment" doctrine because Intervenors, as parties to the district court proceedings, may protect their rights by appealing from the final disposition of the case. *See, United States v. California Co-operative Canneries*, 279 U.S. 553, 559 (1929) ("an appeal by one who was permitted to intervene, like an appeal by one of the original parties, must be taken direct to this Court"); *Williams v. Morgan*, 111 U.S. 684, 696 (1884) (intervenor had right to appeal from final judgment); 3B Moore's Federal Practice at 24-169 (2d ed. 1982) and cases

cited therein.Instead of requiring Intervenors to pursue and protect their interests in the district court and in any appeal from final judgment, the Ninth Circuit has authorized Intervenors to forestall and multiply the proceedings by commencing an immediate appeal of one of the component elements of the litigation. In so acting, the Ninth Circuit has scuttled the reasoning and mandate of *Brotherhood of Railroad Trainmen*.

The inherent inconsistency between the Ninth Circuit's September 6, 1984 opinion and *Brotherhood of Railroad Trainmen* is apparent from the Ninth Circuit's analysis in its own June 4, 1984 opinion. There, the Ninth Circuit, citing *Brotherhood of Railroad Trainmen*, opines that an interlocutory appeal of an intervention order is appropriate only where "[i]mmediate review is necessary to protect the interests of the applicant." Slip op. at 3. The Ninth Circuit's June 4, 1984 opinion goes on to explain that immediate review of an order permitting intervention is unnecessary (even if intervention as of right is denied concurrently) because such an order permits the applicant for intervention to become a party to the action and to protect its rights through participation in all subsequent proceedings, including post-judgment appeals. Slip op. at 3-4. All of this analysis, which flows from this Court's decision in *Brotherhood of Railroad Trainmen*, was subsequently abandoned without explanation by the Ninth Circuit when it granted a rehearing and reinstated the Intervenors'appeal on September 6, 1984.

The analysis undertaken by this Court in more recent decisions further confirms that an order granting permissive intervention but denying intervention as of right is not immediately appealable. Under this Court's decisions, an order will be considered final and appealable only if such

order will "conclusively determine the disputed question, resolve an important issued separate from the merits of the action and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). An order granting permissive intervention but denying intervention as of right fails to meet this standard because it may be reviewed on appeal from a final judgment. *See* 3B Moore's Federal Practice at 24-163 *et seq.* (2d ed. 1982) and cases cited therein.

2. THE JURISDICTIONAL DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS RENDERED BY THE FIRST, SECOND AND FIFTH CIRCUITS

In its June 4, 1984 opinion, the Ninth Circuit acknowledged and followed decisions from three other circuits which all held that orders granting permissive intervention but denying intervention of as right are not immediately appealable. The Ninth Circuit specifically observed that two of the other circuits had relied upon "the strong federal policy against piecemeal appeals" in dismissing such interlocutory appeals. Slip op. at 4. The Ninth Circuit also observed that "because intervenors [in the cases from the other circuits] were allowed to intervene as parties with full appellate rights, they could protect their interests adequately on appeal from a final decision." Slip op. at 3-4. The Ninth Circuit adopted this analysis from the other circuits and concluded "that imposing restrictions on permissive intervention does not render that decision immediately reviewable, absent obvious prejudicial error." Slip op. at 3.

In its September 6, 1984 opinion, however, the Ninth Circuit withdrew its initial opinion and held, on the basis of

State of California v. Block, 690 F.2d 753 (9th Cir. 1982), that "[d]enial of intervention as of right is a final appealable order despite the grant of permissive intervention."[8] In so holding and in refusing to reconsider *Block en banc* (as requested by petitioners), the Ninth Circuit elected to depart from the analysis and holdings of three other circuits in an apparent effort to maintain consistency of law within the Ninth Circuit.[9]

The Ninth Circuit's decision in this action conflicts with the decisions from the First, Second and Fifth Circuits. In *Shore v. Parklane Hosiery Co., Inc.*, 606 F.2d 354 (2d Cir. 1979), for example, the Second Circuit held that an order denying full intervention as of right but granting limited permissive intervention "for the purpose of participating in . . . settlement approval hearings" was not final or appealable.[10] In so holding, the Second Circuit opined:

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[8]*Block* involved an appeal of an injunction and judgment entered against the Forest Service for failing to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4331-4332 (1976). In connection with the post-judgment appeal, an intervenor in the case also challenged the district court's order granting permissive intervention but denying intervention as of right. None of the other parties in the case briefed the intervention question. The Ninth Circuit held that the appeal of the intervention order was untimely because the order was final and appealable immediately upon its entry by the district court. 690 F.2d at 776.

[9]The *Block* decision was not discovered by any of the parties or by the Ninth Circuit in this case until after the Ninth Circuit's June 4,1984 opinion was issued because of what appears to be a misprint in the *Block* opinion. The *Block* opinion refers to an application for intervention under Fed. R. Civ. P. 19(a) instead of Fed. R. Civ. P. 24(a). Accordingly, *Block* is not listed in the annotations under Fed. R. Civ. P. 24, nor was it retrieved by the parties in their computer searches under Fed. R. Civ. P. 24.

[10]The district court in *Shore* apparently denied intervention as of right

> The order . . . made appellants parties to the litigation, thus giving them the right to appeal from an unsatisfactory final order. On that appeal, this Court may review the district court's refusal to grant all of appellants' requested relief . . . . The district court's order is therefore interlocutory and cannot now be reviewed on appeal.

606 F.2d at 357 (citations omitted). The Second Circuit expressly noted that its holding was intended to "comport with the Supreme Court's '[long-established] policy against piecemeal appeals.' " 606 F.2d at 357 *quoting Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) and *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

Shore was followed by the First Circuit in *Kartell v. Blue Shield*, 687 F.2d 543 (1st Cir. 1982). There, intervenors who had sought intervention permissively and as of right appealed from an order granting limited or conditional intervention.[11] The First Circuit dismissed the appeal, holding that the order was "not appealable under either 28

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because it found that two of the three elements necessary for intervention as of right under Fed. R. Civ. P. 24(a)(2) — the so-called "impairment of interest" and "adequacy of representation" elements — were not established by the applicants in *Shore*. 606 F.2d at 357. The Second Circuit found and held that the district court's findings on these elements "were not prejudicially erroneous." *Id.* at 357-58.

[11]The district court in *Kartell* "did not indicate whether it had acted under authority of Rule 24(a) or Rule 24(b)" in allowing intervention. 687 F.2d at 548. However, as set forth in the portion of the First Circuit's opinion quoted in the text above, the First Circuit found it unnecessary to determine the basis for the district court's action because intervenors had a right of appeal *at the conclusion* of the proceedings regardless of the basis for the district court's action.

U.S.C. § 1291 or 28 U.S.C. § 1292(a)(1)." 687 F.2d at 554. The Court stated:

> We . . . conclude that the district court's order in the case at bar should be treated as a grant of intervention, and as such is not now appealable. The intervenors were allowed to intervene, and as parties to the suit with full appellate rights in this action, can adequately protect their interests on appeal from a final decision. They are therefore distinguishable from would-be intervenors who if denied intervention altogether are without appellate rights unless allowed immediately to appeal. Regardless of whether intervenors are in fact intervenors of right or whether they are entitled to raise the new claims contained in their complaint in intervention, these questions can be resolved upon completion of the proceedings before the district court with no more prejudice to the intervenors than is caused to any litigant properly denied interlocutory review of an unfavorable order. Their asserted need to protect their right of full intervention does not justify circumventing the strong federal policy against piecemeal appeals.

687 F.2d at 550 (citations omitted).

The Fifth Circuit has also held that an order denying intervention as of right but granting limited permissive intervention is not immediately appealable. In *Wheeler v. American Home Products Corp.*, 582 F.2d 891 (5th Cir. 1977), intervenors appealed after final judgment from the district court's earlier order granting limited leave to intervene "not as of right, but as a matter of permission."

582 F.2d at 894.[12] The Fifth Circuit expressly rejected appellee's argument that the appeal was untimely, opining, "the order ... did not deny intervention. It allowed intervention as a matter of discretion. Under the established rule, the order was not appealable." 582 F.2d at 896. The Fifth Circuit thus proceeded to review the intervention order in connection with the appeal from the final judgment.

Each of these decisions from the First, Second and Fifth Circuits are founded upon the holdings and analysis of *Brotherhood of Railroad Trainmen* and its progeny. Indeed, the Second Circuit's opinion in *Shore* expressly relies upon the three major decisions of this Court which are cited in Section 1 above: *Brotherhood of Railroad Trainmen*; *Cobbledick v. United States*, 309 U.S. 323, 325 (1940); and *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The First Circuit's opinion in *Kartell* adopts the same analysis. Petitioners respectfully submit that the decisions of the First, Second and Fifth Circuits are in accord with the controlling precedents of this Court and that the Ninth Circuit's departure from such precedents warrants issuance of a writ of certiorari in this action.

[12]The fact that intervenors in *Wheeler* sought intervention as of right is apparent from their argument that the existing parties did not adequately represent their interests, an element required for intervention as of right under Fed. R. Civ. P. 24(a). *See*, 582 F.2d at 894.

3. THE DECISION ON THE MERITS BELOW IS IN CONFLICT WITH A DECISION FROM THE SECOND CIRCUIT.

The decision of the Ninth Circuit that Intervenors here are entitled to intervene as of right under Fed. R. Civ. P. 24(a) is directly contrary to a recent Second Circuit case with facts virtually identical to the facts of the case at bar.

In *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984), four environmental organizations appealed from the district court's order denying intervention in an action by the United States and the State of New York seeking, among other things, recovery of the costs of cleaning up a four-acre waste disposal site located in New York. Like the case at bar, the governmental plaintiffs in *Hooker* asserted claims for relief under § 1431 of Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300i; § 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973; and § 504 of the Clean Water Act ("CWA"), 33 U.S.C. § 1364. 749 F.2d at 970-71. All of these statutes allow the government to commence actions where conditions or conduct create "an imminent and substantial endangerment" to public health or welfare.

The environmental organizations in *Hooker*, many or all of whose members were "directly affected" by the pollution flowing from the disposal site, sought to intervene as of right under the citizen suit provisions of each of the above statutes and under the standards set forth in Fed. R. Civ. P. 24(a)(2) ("Rule 24(a)(2)"). 749 F.2d at 969. At least two of the organizations also sought permissive intervention under Fed. R. Civ. P. 24(b) ("Rule 24(b)"). *Id.* at 973-74.

The district court denied intervention as of right and also denied permissive intervention but allowed and "strongly encourage[d] each of the applicants to participate" as *amicus curiae* in the proceedings. 749 F.2d at 976. In a scholarly opinion by Judge Friendly, the Second Circuit affirmed, holding that (i) intervention as of right was not appropriate under Fed. R. Civ. P. 24(a)(1) ("Rule 24(a)(1)") because none of the statutes relied upon granted a right to intervene, and (ii) intervention as of right was not appropriate under Rule 24(a)(2) because the applicants' interests were adequately represented by the governmental plaintiffs in their capacity as *parens patriae*.

Although the Ninth Circuit's decision to delay the issuance of its opinion in this action precludes any in-depth comparison of the Ninth Circuit's analysis with that of the Second Circuit in *Hooker*, the result reached by the Ninth Circuit is squarely in conflict with that reached by the Second Circuit. Like *Hooker*, the case at bar is one being pursued by the federal and state governments under the "imminent and substantial endangerment" or so-called "emergency relief" provisions of a variety of federal and state statutes. Like the proposed intervenors in *Hooker*, Intervenors here claim to be "directly affected" by the alleged contamination that is the subject of the action. Like the proposed intervenors in *Hooker* who did not want to prejudice "tort claims" the claimed to have against the United States and the State of New York for apparent improper handling of the site, Intervenors here claim that the governmental plaintiffs are culpable and liable for conditions at the Stringfellow site. Finally, like the proposed intervenors in *Hooker*, Intervenors here argued below that intervention as of right is appropriate either under the "citizen suit" provisions of the SDWA, RCRA and CWA or under the standards of Fed. R. Civ. P. 24(a)(2). Under

these circumstances, the conflict between the Ninth Circuit's decision in this action and the Second Circuit's in *Hooker* will continue to exist regardless of whether the Ninth Circuit ultimately seeks to justify its March 18, 1985 Order under Rule 24(a)(1) or Rule 24(a)(2).

To the extent that the Ninth Circuit relies upon Rule 24(a)(1) to justify the result announced in its March 18, 1985 Order, a clear conflict concerning the proper interpretation of the SDWA, RCRA and CWA exists. The Second Circuit in *Hooker*, citing a number of lower court decisions and other authorities, squarely held "that neither the CWA nor the SDWA nor the RCRA affords [applicant for intervention] a statutory right to intervene in a government initiated action under the emergency powers provision of those acts." 749 F.2d at 978. Intervenors in the case at bar cited no statutory bases, other than the three statutes relied upon in *Hooker*, upon which the right to intervene under Rule 24(a)(1) could arguably be granted in this action. Thus, insofar as the Ninth Circuit's decision in this action is based upon Rule 24(a)(1), it is inconsistent with *Hooker* and a writ of certiorari should be granted by this Court to resolve the conflict.

Similarly, a conflict with *Hooker* exists to the extent the Ninth Circuit relies upon Rule 24(a)(2) to justify its decision reversing the district court's denial of intervention as of right. Rule 24(a)(2) provides that intervention as of right should be granted where an applicant for intervention "claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." While Intervenors in this action appear to satisfy

the first portion of this standard, they, like the proposed intervenors in *Hooker*, are adequately represented by the governmental plaintiffs suing on behalf of their citizens. Indeed, as set forth more fully above, Intervenors here are in precisely the same position as the applicants for intervention in *Hooker*. Inasmuch as the case at bar is, for purposes of applying Rule 24, factually identical to *Hooker*, the difference in the results reached by the Second and Ninth Circuits can only be attributed to application of differing legal standards.

The delay in the issuance of the Ninth Circuit's opinion prevents petitioners from determining precisely what legal standard was applied by the Ninth Circuit in reaching its decision. However, based upon the briefing and oral argument in the Ninth Circuit, petitioners believe that the legal standard applied by the Ninth Circuit is in conflict with *Hooker* and decisions of this Court in at least two respects. First, to the extent that the Ninth Circuit departed from an "abuse of discretion" standard in reviewing the district court's determinations with respect to the various elements required to be established for intervention under Rule 24(a)(2), the Ninth Circuit's decision is in conflict with this Court's decision in *NAACP v. New York*, 413 U.S. 345, 366 (1973) (timeliness prong of Rule 24(a)(2) must be reviewed under an "abuse of discretion" standard) and decisions from at least three other circuits. *See, e.g., Hooker*, 749 F.2d at 990-91; *Virginia v. Westinghouse Electric Corp.*, 542 F.2d 214, 216 (4th Cir. 1976); *EEOC v. United Airlines*, 515 F.2d 946, 949 (7th Cir. 1975).

Second, to the extent that the Ninth Circuit failed to require that Intervenors make "a strong affirmative showing that the sovereign is not fairly representing [their] interests," the Ninth Circuit's decision conflicts with

Hooker and decisions from the Third, Fifth, and District of Columbia Circuits, all of which require "that, in litigation of this sort, a greater showing that representation is inadequate should be required." *Hooker*, 749 F.2d at 985 *citing Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d Cir.), *cert. denied sub nom. Fire Officers Union v. Pennsylvania*, 426 U.S. 921 (1976); *Delaware Valley Citizens' Council v. Pennsylvania*, 674 F.2d 970, 973-74 (3d Cir. 1982); *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 690 F.2d 1203, 1213 & n. 7 (5th Cir. 1982); *Wade v. Goldschmidt*, 673 F.2d 182, 186 n. 7 (7th Cir. 1982).

Once the Ninth Circuit issues its opinion, the precise legal standard applied by the Ninth Circuit in reaching its March 18, 1985 decision will become known and the legal issues to be considered by this Court may be narrowed and more easily identified. Accordingly, as noted above, petitioners respectfully request that the Court allow petitioners to supplement this petition upon issuance of the Ninth Circuit's opinion and that the Court not act upon the second issue presented by this petition until such opinion is issued.

4. THE DECISION BELOW IS RIPE FOR REVIEW

This Court unquestionably has jurisdiction under 28 U.S.C. § 1254 to review decisions of the Courts of Appeals which do not represent final judgments. *See, e.g., Forsyth v. City of Hammond*, 166 U.S. 506 (1897). This Court has repeatedly exercised its discretion to review issues on certiorari prior to final judgment in underlying district court actions, where, as here, "the interest of judicial economy" is better served by a prompt resolution of the questions presented than by postponement of review until

entry of a final judgment. *See, Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting from the Court's grant of certiorari).

Review on certiorari is necessary to resolve a conflict in the circuits created by the decision in this case. Judicial economy is not served by postponing correction of the conflict created by the Ninth Circuit. The delay would only result in uncertainty in the Courts of Appeals and an increase in the number of decisions subject to review for error on the questions presented by this petition. For these reasons, this Court has granted certiorari prior to final judgment in order to resolve conflicts on a number of occasions. *See, e.g., Forsyth v. City of Hammond*, 166 U.S. at 515; *United States v. General Motors Corp.*, 323 U.S. at 373, 377 (1945); *Myers v. Bethleham Shipbuilding Corp.*, 303 U.S. 41, 43-44 (1938).

Indeed, the procedural posture of this case is virtually identical to that of two recent cases decided by this Court: *Firestone Tire & Rubber Co., v. Risjord*, 449 U.S. 368 (1981) and *Flanagan v. United States*, 465 U.S. 259 (1984). In both of these cases, the Court granted certiorari prior to final judgments to resolve conflicts among the circuits on whether orders granting or denying disqualification of counsel are appealable.

Moreover, there are compelling reasons for granting the writ in this particular case. The underlying action is one of many initiated by federal and state authorities under RCRA, SDWA, CWA and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") to facilitate the clean-up of active or abandoned waste disposal sites. The United States Environmental Protection Agency has estimated that as of 1979, "as many as 30,000 to 50,000 [such] sites existed, of

which between 1,200-2,000 present a serious risk to public health." H. Rep. No. 96-1016, 96th Cong., 2d Sess. 18 (1980). Congress itself enacted CERCLA believing that many such sites constitute a "serious threat to our Nation's public health and environment." S. Rep. No. 96-848, 96th Cong., 2d Sess. 2 (1980). While the extent of this national problem remains unclear, there is little doubt that the government, potentially responsible parties, citizens living near the sites and, ultimately, the nation as a whole have compelling interests in addressing the problem before the scope and expense of clean-up becomes unmanageable and before the public health is threatened.

Piecemeal appeals from the component elements of emergency relief actions under these various federal statutes, such as the appeal heard by the Ninth Circuit in this case, unnecessarily and seriously prejudice and delay the parties' abilities to resolve such actions. The likely result of such piecemeal appeals is an increase in the difficulty and ultimate expense of cleaning-up waste disposal sites.

Given the number of waste disposal sites which are now, or may in the future become, the subject of governmental enforcement actions and the desire of environmental and industrial groups to participate in such actions, judicial economy and uniformity of law will best be served by resolving the issues presented by this petition at this time. Both *Hooker* and the case at bar aptly establish the willingness of the parties involved in governmental enforcement actions to pursue vigorously their perceived rights at every level of the federal court system. So long as the decision entered by the Ninth Circuit in this case remains the law of that circuit and so long as a conflict exists among the circuits on the issues presented by this petition, federal courts at all levels should expect to be

besieged with disputes concerning the role and rights of intervenors in all actions under CERCLA, RCRA, SDWA AND CWA.

For all of these reasons, delaying review of the questions presented by this petition until after a trial in the district court would be inappropriate in this case. This Court should exercise its discretion to review the issues presented at this time.

CONCLUSION

The Ninth Circuit's decision to allow an immediate appeal of an order granting permissive intervention but denying intervention as of right is at-odds with the decisions of this Court and the decisions of three other circuits following this Court's directives. Moreover, the Ninth Circuit's decision that Intervenors here are entitled to intervene as of right is in conflict with a recent decision from the Second Circuit. The interests of judicial economy and uniformity of national law justify immediate correction of these conflicts. Petitioners respectfully request hat a writ of certiorari be granted and the decision of the Ninth Circuit reversed or vacated.

Respectfully submitted,

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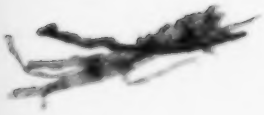

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APPENDIX

APPENDIX

UNITED STATES of America
Plaintiff-Appellee,

v.

J.B. STRINGFELLOW, Jr., et al.,
Defendants-Appellees,

Concerned Neighbors In Action and
Penny Newman,
Intervenors-Appellants.

No. 84-5682.

United States Court of Appeals,
Ninth Circuit.

March 18, 1985

Before GOODWIN and REINHARDT, Circuit Judges, and SOLOMON,* District Judge.

ORDER

The portion of the order of February 17, 1984 denying appellants' motion to intervene as of right is reversed. The portion of the order granting appellants leave to intervene permissively is vacated. Upon remand appellants shall be granted leave to intervene as of right.

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* Hon. Gus D. Solomon, Senior United States District Judge fo the District of Oregon, sitting by designation.

In view of the decision set forth above, we need not decide the question as to the appropriateness of the conditions that the district court attached to the appellants' participation as a Permissive intervenor. We, of course, express no view as to what conditions, if any, may appropriately be placed upon the appellants' participation in the litigation in their capacity as intervenors as of right, or upon the participation of any other parties to the litigation. An opinion will follow.

REVERSED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

No. CV-83-2501-MML
United States District Court
Central District of California

United States of America, et al.,
Plaintiffs,

v.

J. B. Stringfellow, Jr., et al.,
Defendants.

Concerned Neighbors in Action,
etc., et al.,
Intervenors

United States Department of the Air Force,
et al.,
Third Party Defendants.

February 17, 1984

The motion of Concerned Neighbors in Action ("CNA") and Penny Newman came on for hearing before the Court, the Honorable Malcolm M. Lucas, District Judge, presiding, on October 3, 1983. Having carefully considered the papers filed and the oral argument of counsel, the Court grants CNA and Newman leave to intervene permissively pursuant to Federal Rule of Civil Procedure 24(b).

FACTS

Plaintiffs United States of American and the State of California filed suit on April 21, 1983 seeking an order

compelling (1) abatement of the releases and threatened releases of hazardous substances from the Stringfellow Acid Pits, located in Glen Avon, California; (2) all actions necessary to remedy the conditions which have caused or may contribute to or present an imminent and substantial endangerment to the public health, welfare and environment caused by such releases; and (3) reimbursement of all funds expended by plaintiffs for the response, removal, and remedial costs and damage to natural resources. Plaintiffs named thirty-one waste generator, transporter, and owner individuals and companies as defendants in the action.

CNA, a non-profit corporation, and Penny Newman, a resident, taxpayer, Glen Avon property owner, and chairperson of CNA, have moved the Court for leave to intervene. The applicants assert an unconditional right to intervene pursuant to Federal Rule of Civil Procedure 24(a) (intervention as of right) and the right to intervene by permission of the Court pursuant to Rule 24(b).

Plaintiffs oppose intervention as of right, and support permissive intervention. Plaintiffs urge that certain conditions be placed on such intervention.

Defendants oppose applicants' motion for intervention as of right, but concede that CNA and Newman may intervene permissively, subject to limitations that the Court may impose in its discretion.

DISCUSSION

The Court concludes, for the following reasons, that applicants cannot intervene as of right. The Court permits applicants to intervene under Rule 24(b) subject to certain conditions.

(1) Intervention as of Right

Federal Rule of Civil Procedure 24(a) provides:

Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(a) No statute Confers an Unconditional Right to Intervene

Applicants argue that they have the right to intervene under:

(1) Section 1431 of the Safe Drinking Water Act, 42 U.S.C. § 300(i)(a); ("SDWA")

(2) Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973; ("RCRA")

(3) Sections 514 and 311 of the Clean Water Act, 33 U.S.C. §§ 1364, 1321 ("CWA").

The Court will discuss each statute in turn.

Safe Drinking Water Act, 42 U.S.C. § 300(i)(a)

Plaintiffs assert in their First Amended Complaint, Sixth Claim for Relief, a claim under the "Emergency Powers" provision of the SDWA. This provision states:

> the Administrator [of the Environmental Protection Agency], upon receipt of information that a contaminant which is present in or is likely to enter a public water system may present an imminent and substantial endangerment to the health of such persons, may take such actions as he may deem necessary in order to protect the health of such persons. . . The action which the Administrator may take may include . . . (2) commencing a civil action for appropriate relief, including a restraining order or permanent or temporary injunction. 42 U.S.C. § 300(i)(a).

Applicants contend that the "Citizen suit" provision of the SDWA confers an unconditional right to intervene in this "imminent danger" proceeding by the Administrator. This "Citizen suit" section provides:

> (a) Except as provided in §§ (b) of this section, any person may commence a civil action on his own behalf —
>
> (1) against any person . . . who is alleged to be in violation of any requirement prescribed by or under this title. . . .
>
> . . . .'(b) No civil action may be commenced —
>
> (1). . . .(B) If the Administrator, the Attorney General, or the State has commenced and is diligently prosecuting a civil action in a court of the United States *to require compliance with such requirement*, but in any such action in a Court of the United States any person may intervene as a matter of right. . . ."
>
> 42 U.S.C. § 300j-8. (Emphasis added.)

The Court finds that the right to intervene set forth in the Citizen Suit provision, 42 U.S.C. § 300j-8, is limited to cases in which the Administrator seeks compliance with a "requirement" of the SDWA. Plaintiffs in the instant case do not seek such compliance, but sue for injunctive relief to remedy an "imminent and substantial endangerment to health." SDWA's citizen suit provision does not apply. *See Town of North Hempstead v. Village of North Hills*, 482 F.Supp. 900, 904 (E.D.N.Y. 1979) (Court dismissed plaintiffs' claim under 42 U.S.C. § 300j-8, stating that the statute authorized a civil action only where a violation of a regulation prescribed by or under the Act was alleged).

Resource Conservation and Recovery Act, 42 U.S.C. § 6973

Plaintiffs' Third Claim for Relief, First Amended Complaint, is based on the "imminent Hazard" provision of RCRA, 42 U.S.C. § 6973 (9182) which provides in part:

> upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit . . . to immediately restrain any person contributing to such handling, storage, treatment, transportation, or disposal to stop such handling. . . or to take such other action as may be necessary. . . .

Applicants CNA and Newman seek to intervene under RCRA's citizen suit provision, which is similar to that of SDWA:

(a) Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf (1) against any person . . . who is alleged to be in violation of any *permit, standard, regulation, condition, requirement or order* which has become effective pursuant to this Act;

(b) No action may be commenced under paragraph (a)(1) of this section . . . (2) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a state to require compliance with such *permit, standard regulation, condition, requirement, or order*; provided, however, that in any such action in a court of the United States, any person may intervene as a matter of right.

42 U.S.C. § 6972 (Emphasis added.)

Like that of SDWA, the Citizen Suit provisions of RCRA do not mention any right to intervene in actions brought pursuant to the Administrator's emergency powers. *United States v. Hooker Chemicals & Plastics Corporation*, 540 F.Supp. 1067 (W.D.N.Y. 1982).

In *Hooker, supra*, the court held that the Citizen Suit provision of RCRA did not confer a right to intervene in the Imminent Hazard provision.

The federal government sued Hooker, owner of an industrial waste disposal facility, pursuant to the emergency relief provision of RCRA and other statutes. Local property owners and a public interest group applied to intervene based on RCRA's Citizen Suit provision. The court allowed intervention in the government's emergency relief action brought under 42 U.S.C. § 6973.

The court pointed out that RCRA's Citizen Suit provision extended only to RCRA actions seeking compliance with a "permit, standard, regulation, condition, requirement, or order." 540 F.Supp. at 1080-1081 n. 7. Plaintiffs in *Hooker*, like those in the instant case, did not seek such compliance, but injunctive relief pursuant to 42 U.S.C. § 6973. *Id.*

The Court is not persuaded by applicants' claim that the Imminent Hazard section of RCRA "provides an alternative or supplementary procedure" to the Citizens Suit section. Applicants cite *United States v. Olin Corporation*. Civil Action No. 80-PT-5300-NE (N.D. Ala. 1982), an unpublished opinion, in support of their argument. In *Olin*, the City of Triana, Alabama, moved to intervene in a suit by the United States against Olin Corporation pursuant to *inter alia*, Federal Rule of Civil Procedure 24(a) and RCRA § 6972.

The court stated that, in its complaint, the United States generally categorized Olin's activities as being "unlawful," *Id.* At p.4. The City therefore had the right to intervene pursuant to the Clean Water Act, 33 U.S.C. § 1365(b)(1)(B), by virtue of Section § 1365(f), which defined "effluent standard or limitation" as "(1) an unlawful act under subsection (a) of Section 1311 of this title." *Id.* Without citing any authority, the *Olin* court then found that because of RCRA § 6973(a)'s similarity to CWA § 1364, RCRA's citizen suit provision also allowed intervention. *Contra Hooker, supra*, and *United States v. Reilly Tar & Chemical Corporation*, 546 F.Supp. 1100 (D. Minn. 1982) (Court stated that § 6973 was never intended to "be used as a substitute procedure for chronic and recurring pollution problems that may be dealt with under other status." 546 F.Supp. at 1110).

Clean Water Act, 33 U.S.C. § 1365

Applicants also claim that the Clean Water Act, 33 U.S.C. § 1365, provides a statutory right to intervene. However, the Court finds that, like that of RCRA and SDWA, the plain language of the statute's emergency relief and citizens' suit provisions does not confer such an unconditional right to intervene.

Plaintiffs' Fourth and Fifth Claims for Relief are based on Sections 504 and 311 of the CWA, 33 U.S.C. § 1364 and § 1321, respectively.

Section 504 of the Clean Water Act, 33 U.S.C. § 1364 provides as follows:

> Notwithstanding any other provision of this Act, the Administrator [of the Environmental Protection Agency] upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons . . . may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.

Section 311 prohibits the discharge of hazardous substances into navigable waters of the United States, providing that whenever such substance is discharged or there is a substantial threat of such discharge the President is authorized to act to remove this substance. 33 U.S.C. § 1321(b)(3) and (c).

Finally, Section 505, 33 U.S.C. § 1365, provides for citizens suits:

Section 505 states in pertinent part:

> (a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf
>
> (1) against any person . . . who is alleged to be in violation of (A) an *effluent standard or limitation* under this chapter or (b) *an order* issued by Administrator or a State will respect to such *a standard or limitation* . . .
>
> * * *
>
> The district courts shall have jurisdiction . . . to enforce such an *effluent standard or limitation* or such an order . . . as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act (33 U.S.C. § 1319).
>
> (b) No action may be commenced — under subsection (a)(1) of this section — if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the *standard, limitation, or order*, but in any such action in a court of the United States any citizen may intervene as a matter of right. 33 U.S.C. § 1365. (Emphasis added.)

Section 505(f) defines the term "effluent standard or limitation":

> The term "effluent standard or limitation under this Act' means (1) effective July 1, 1973, an unlawful act under subsection (a) of Section 301 of this Act (33 U.S.C. § 1311); (2) an effluent limitation or other limitation under section 301 or

> 302 of this Act (33 U.S.C § 1311 or 1312); (3) standard of performance under section 306 of this Act (33 U.S.C. § 1316); (4) prohibition, effluent standard pretreatment standards under section 307 of this Act (33 U.S.C. § 1317); (5) certification under section 401 of this Act (33 U.S.C. § 1341); or (6) a permit or condition thereof issued under section 402 of this Act (33 U.S.C. § 1342), which is in effect under this Act (including a requirement applicable by reason of section 313 of this Act (33 U.S.C. § 1323).

The Court concludes that, because violations of §§ 1321 and 1364 are not expressly enumerated among the violations of "effluent standards or limitations," citizens do not have a statutory right to intervene in emergency relief actions under 33 U.S.C. § 1365.

The legislative history of the Clean Water Act is consistent with this finding. The Senate Report stated: "The provision in this bill is carefully restricted to actions where violations of standards and regulations or a failure on the part of officials to act are alleged." S. Rep. No. 414, 92nd Cong., 2d Sess., *reprinted in* (1972) U.S. Code Cong. and Ad. News 3745.

Finally, judicial interpretations of the Clean Water Act's citizen suit provision seem also to preclude intervention by applicants in the emergency relief proceedings. For example, in *Stream Pollution Control Board v. United States Steel Corporation*, 512 F.2d 1036 (7th Cir. 1975), plaintiff sued under the federal common law of nuisance to abate pollution of a Lake Michigan tributary. A private citizen claimed an unconditional right to intervene under the citizen suit provision of the CWA. Upholding the

district court's denial of the motion to intervene, the Seventh Circuit stated:

> Under 33 U.S.C. § 1365(b)(1)(B) . . . a private citizen . . . is entitled to intervene if, and only if, the underlying action was commenced and is being prosecuted to require compliance with a 'standard, limitation, or order' within the meaning of the 1972 Act. We hold that an action to abate a nuisance . . . is not such an action and that the motion to intervene was therefore correctly denied. *Id.* at 1041.

In the instant case, plaintiffs like that of plaintiff in *Stream Control*, seek to abate an imminent and substantial endangerment. This is not an action to require compliance with a "standard, limitation, or order," therefore, § 1365 does not confer any right to intervene on applicants in this suit.

In addition, the court's discussion of § 1365 in *City of Philadelphia v. Stepan Chemical Company* 544F.Supp. 1135 (E.D. Pa. 1982) supports this view. In *Stepan*, the court held that the citizen suit provision of CWA did not provide the City with a cause of action for damages: cleanup cost in removing hazardous substances discharged into the Delaware river in violation of 33 U.S.C. § 1321.

The court stated that § 1365 "evidence(d) a congressional intent to carefully channel citizen participation in the enforcement of the Act ... its sole purpose is to provide private parties with a mechanism to compel the enforcement of effluent standards promulgated pursuant to the Act." *Id.* at 1145, 1146. Sp1 Applicants CNA and Penny Newman cite *United States v. Hooker Chemicals & Plastics Corporation*, 540 F.Supp. 1067 (W.D.N.Y. 1982), in support of their motion to intervene under CWA. Indeed,

in *Hooker*, the court held that the citizen suit provision of SWA allowed intervention, but that of RCRA did not. (See discussion of RCRA, *supra*). Unlike the *Stringfellow* case, the underlying action in *Hooker* involved claims for relief under § 1319 of CWA. Section 1319 authorizes penalties for violations of the "effluent standards" established by § 1311. The citizen suit provision, § 1365, expressly authorizes suits on such claims.

In conclusion, the Court finds that none of the statutes cited by applicants expressly confer "an unconditional right to intervene" pursuant to Fed.R.Civ. Proc. 24(a)(1).

(b) No Intervention as of Right under Fed.R.Civ. Proc. 24(a)(2)

The Ninth Circuit has established a four-part test for determining whether applications to intervene as of right should be granted pursuant to Rule 24(a)(2):

> (1) The applicant's motion must be timely;**
>
> (2) The applicant must assert an interest relating to the property or transaction;
>
> (3) The applicant must be so situated that without intervention, the disposition may, as a practical matter, impair or impede his ability to protect that interest; and
>
> (4) The applicant's interest must be adequately represented by the other parties.

Sagebrush Rebellion, Inc. v Watt, 713 F.2d 525 (9th Cir. 1983) (*Citing Smith v. Pangilinan*, 651 F.2d 1320 (9th Cir.

** The parties agree that the application was timely.

1981)). Applying this test to the instant case, the Court finds that applicants do not properly intervene under 24(a)(2).

(1) Applicants have an "Interest"

An applicant for intervention need only show that she has a "protectable interest" in the outcome of the litigation of sufficient magnitude to warrant inclusion in the action. *Smith, supra*. It is obvious that applicants CNA and Penny Newman possess such an interest: Living and working in the neighborhood of the Site, they claim a direct and substantial interest in the immediate abatement of further toxic waste releases, and cleanup of past releases.

(2) Practical Impairment of Applicants' Interests

The purpose of the second requirement of Rule 24(a)(2) is to allow intervention by those who might be practically disadvantaged by the disposition of the action. 7A Wright, Miller & Kane, *Federal Practice & Procedure* § 1908, p. 514. *Stare decisis* may supply this practical disadvantage; however, the *stare decisis* problem is "greatly lessened where there are parties already in the suit whose position on the issues is the same as the absent parties." *Blake v. Pallan*, 555 F.2d 947 (9th Cir. 1977).

(3) Adequate of Current Representation

For the purposes of determining adequacy of current representation, the Ninth Circuit has outlined a three-part test:

> (i) Are the interests of the present party in the suit sufficiently similar to that of the absentee

such that the legal arguments of the latter will undoubtedly be made by the former;

(ii) Is that present party capable and willing to make such arguments, and

(iii) If permitted to intervene, would the intervenor add some necessary element to the proceedings which would not be covered by the parties in the suit?

County of Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980). In addition to this showing, applicants must overcome the presumption of adequacy of representation by state and federal governmental agencies: "In the absence of a very compelling showing to the contrary, it will be assumed that the United States adequately represents the interest of its citizens . . . The very rare cases in which a member of the public is allowed to intervene . . . are cases in which a very strong showing of inadequate representation has been made. 7A Wright, Miller & Kane, *supra* at § 1909, pp. 528-531 (*Citing Cascade Natural Gas Co. v. El Paso Natural Gas Co.*, 386 U.S.129 (1967)).

Under the Ninth Circuit test and the requirement of a compelling showing of inadequate representation, applicants cannot properly intervene under Rule 24 (a)(2).

(i) Applicants and Existing Parties Share Similar Interests

Both applicants and plaintiffs seek the expeditious abatement and cleanup of the Stringfellow site. However, applicants allege certain "conflicts of interest" among existing plaintiffs that would hinder vigorous litigation by existing plaintiffs. For example, applicants allege that the United States Air Force was the ninth largest dumper of

toxic wastes at the site, but plaintiffs have not named it as a defendant.

However, the United States agrees that permissive intervention is appropriate with respect to the claims of intervenors seeking relief against the Air Force. The Court finds that both federal and state governments, by initiating the suit and vigorously advocating their claims, actively represent the interests of the applicants. In addition, existing defendants have filed counterclaims against plaintiffs, and thus share similar interests of proposed intervenors in their claims against the government.

(ii) Existing Parties are Capable and Willing to Make these Arguments

Applicants assert seventeen claims in their proposed complaint. The factual allegations and the first nine claims almost duplicate the First Amended Complaint. The applicants' adoption of the allegations and claims of the First Amended Complaint demonstrates that existing plaintiffs are capable and willing to make these arguments.

Applicants' claims for nuisance, strict liability and negligence, while not part of the plaintiffs' suit, will not be impaired by allowing the existing parties to complete the litigation on the present claims.

(iii) No Necessary Element will be Added by Intervention

Although applicants CNA and Penny Newman, as residents of Glen Avon, have suffered more directly and immediately from the effects of the toxic wastes, this point of view does not add any "necessary" element to the suit.

Finally, regarding the showing of inadequacy of representation required, applicants argue that they need make only a "minimal" showing of inadequacy. In support of this contention, applicants cite *Sagebrush Rebellion, supra.*

In that case, the Sagebrush Rebellion, a non-profit group interested in land use, sued the Secretary of Interior. The group challenged the legality of (former) Secretary Andrus's actions in recommending the creation of a national conservation area in Idaho.

The Audubon Society (and fifteen others) sought to intervene as of right, as they supported the creation of the conservation area. The Ninth Circuit found that Audubon demonstrated sufficient interest and inadequacy of current representation. In finding Secretary Watt's representation inadequate, the court emphasized that he was previously head of the Mountain States Legal Foundation, which represented Sagebrush Rebellion in the action.

Sagebrush represented a special case in which applicants for intervention were defending the actions of a former government official against a group which had been represented by the present secretary. In the instant case, applicants have cited no similar "changes in viewpoint" which satisfy their burden of showing inadequacy of representation by existing parties.

In conclusion, the Court finds that although applicants have an interest in the litigation, their interests are adequately represented by existing parties, and they cannot intervene as of right pursuant to Rule 24(a)(2).

(2) Permissive Intervention

Fed. R. Civ. Proc. 24(b) provides in relevant part: (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As discussed earlier in this Order, the first nine claims in applicants' proposed complaint in intervention are identical to those in plaintiffs' First Amended Complaint. Thus, the two have common questions of fact or law, and permissive intervention is appropriate.

Pursuant to Rule 24(b), the Court imposes conditions upon granting applicants' motion to intervene. 7A Wright, Miller & Kane, *supra* at § 1922, p. 623-624; *Van Hoomissen v. Xerox Corp.*, 497 F.2d 180, 181 (9th Cir. 1974).

The Court therefore imposes the following conditions on intervention:

(1) No Claims Shall Be Asserted Which Have Not Been Asserted by the Original Parties

The Court finds that allowing applicants to assert their individualized damage and other claims would burden and expand an already complex litigation, and could jeopardize the possibility of settlement. Applicants are thus permitted to intervene in the litigation of the issues raised by the original parties.

(2) Applicants May Not Intervene in Cost Recovery Claims

The applicants can assert no claim with a question of law or fact in common with the Second, Fifth, Seventh and Eighth claims of the First Amended Complaint. In these claims, the governments seek reimbursement under CERCLA for the costs of cleaning up the site. Thus, applicants' interest is more like that of a taxpayer, and they lack standing to pursue these claims. *See Flast v. Cohen*, 392 U.S. 83 (1968).

(3) Restrictions on Intervenors' Power to Initiate Discovery or Motions

The Court wishes to minimize any delay and confusion involved in discovery in this large, complex case. Therefore, the Court holds that applicants may initiate no motion or discovery unless they have (a) met and conferred with all parties or their authorized representatives; (b) and obtained the concurrence of at least one current party to the initiation of such motion or discovery. The Court emphasizes that applicants shall have the right to attend all depositions and to participate to an extent not duplicative of the original parties, and to receive copies of all discovery to the same extent as any other party herein.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

MALCOLM M. LUCAS

Malcolm M. Lucas
United States District Judge

Dated: February 17,1984

No. 84-5682

In the United States Court of Appeals
for the Ninth Circuit

United States of America, et al.,
Plaintiffs-Appellees,

vs.

J.B. Stringfellow, Jr., et al.,
Defendants-Appellees.

Concerned Neighbors in Action
and Penny Newman,
Intervenors-Appellants.

Filed June 4, 1984

Appeal from the United States District Court
for the Central District of California
District Judge Malcolm M. Lucas, Presiding

Submitted April 23, 1984

Before: WRIGHT, SKOPIL, and NORRIS, Circuit Judges.
WRIGHT, Circuit Judge:

The United States and the State of California sued 31 defendants connected with the Stringfellow Acid Pits, a hazardous waste dumpsite near Glen Avon, California. The defendants are former owners of the dumpsite, persons alleged to have transported materials to the dumpsite, and

those alleged to have generated materials deposited there. Plaintiffs seek recovery of costs expended in cleaning up the dumpsite and injunctive relief under federal and state statutes.

Appellants sought leave from the district court to intervene both as of right under Fed. R. Civ. P. 24(a) and permissively under Fed. R. Civ. P. 24(b). Appellants are Concerned Neighbors in Action, comprised of residents, taxpayers, and property owners in the vicinity of the dumpsite, and Penny Newman, co-founder and chair of Concerned Neighbors in Action.

The district court denied appellants' motion for leave to intervene as of right but granted permissive intervention, subject to conditions. The intervenors may not assert claims other than those asserted by the parties, may not join in plaintiffs' cost recovery claims, and may not file a motion or initiate discovery unless they confer with all parties and obtain the permission of at least one party to do so.

The intervenors appeal from the district court's denial of their motion to intervene as of right. They assert that the district court order is reviewable immediately under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949), and under 28 U.S.C. § 1291(a)(1) as the denial of injunctive relief. Plaintiffs and some defendants have moved to dismiss the appeal for lack of jurisdiction. The motions to dismiss were granted in an order entered May 1, 1984. This opinion explains our prior action.

Ordinarily, the denial of a motion for leave to intervene as of right is reviewable under 28 U.S.C. § 1291 as a final order. *Country of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). The unsuccessful applicant for intervention is not a party and cannot appeal from the final judgment in

the litigation. *Brotherhood of Railway Trainmen v. Baltimore & Ohio R.r.*, 331 U.S. 519, 524 (1947). Immediate review is necessary to protect the interests of the applicant.

An order allowing intervention is not a final order, however, and is not appealable. *Van Hoomissen v. Xerox Corp.*, 497 F.2d 180, 181 (9th Cir. 1974). While the district court denied intervention as of right, it granted permissive intervention with restrictions.

We conclude that a denial of intervention as of right is not immediately reviewable when the district court grants permissive intervention. The intervenors' interests are protected adequately by their participation as permissive intervenors. *See Wheeler v. American Home Products Corp.*, 582 F.2d 891, 894-97 (5th Cir. 1977).

Because the district court imposed conditions upon appellants' intervention, however, arguably the permissive intervention was denied in part. *See Van Hoomissen*, 497 F.2d at 181. Denial of permissive intervention is appealable if there is an abuse of discretion. *Id.*

Two other circuits have held that imposing restrictions on intervention as of right does not render that decision immediately reviewable. *Kartell v. Blue Shield, Inc.*, 687 F.2d 543, 549-50 (1st Cir. 1982); *Shore v. Parklane Hosiery Co.*, 606 F.2d 354, 357 (2d Cir. 1979). Those courts stated that because the intervenors were allowed to intervene as parties with full appellate rights, they could protect their interests adequately on appeal from a final decision. *Kartell*, 687 F.2d at 550; *Shore*, 606 F.2d at 357. Both courts noted the strong federal policy against piecemeal appeals. *Kartell*, 687 F.2d at 550; *Shore*, 606 F.2d at 357.

For the same reasons, we conclude that imposing restrictions on permissive intervention does not render that decision immediately reviewable, absent obvious prejudicial

error. *See Shore*, 606 F.2d at 357. We find no such error here. The appellants can protect their interests adequately on appeal from the final decision.

Appellant's assertion that the order is appealable under 28 U.S.C. § 1292(a)(1) as a denial of injunctive relief is meritless also. To establish appealability under that section, the "must show more than that the order has the practical effect of refusing an injunction." *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981). They have not shown the requisite "serious, perhaps irreparable, consequence[s]" or inability to challenge the order effectually at some other point. *Id.*

The motions to dismiss this appeal are granted. The dismissal is without prejudice to the intervenors' right to appeal after the district court enters a final decision.

Appendix

No. 84-5682
United States Court of Appeals
for the Ninth Circuit

United States of America, *et al.*,
Plaintiffs-Appellees,

vs.

J. B. Stringfellow, Jr., *et al.*,
Defendants-Appellees.
Concerned Neighbors in Action,
A non-profit Corporation, *et al.*,
Intervenors-Appellants
September 6, 1984

Before: WRIGHT, SKOPIL, and NORRIS, Circuit Judges.

The opinion filed on June 4, 1984 is withdrawn. A petition for rehearing has advised us that we did not consider the effect of *State of California v. Block*, 690 F.2d 753 (9th Cir. 1982) in the prior opinion. That case was not cited in the briefs or at oral argument and it was not discovered earlier because its discussion of intervention cited the wrong Rule of Civil Procedure which resulted in improper indexing.

It appears that *Block* controls and is not distinguishable from this case. Denial of intervention as of right is a final appealable order, despite the grant of permissive intervention. *Block*, 690 F.2d at 776.

The motion to dismiss the appeal is denied. The appeal will be calendared for a decision on the merits in due course.

No. 84-5682
United States Court of Appeals
for the Ninth Circuit

United States of America
Plaintiff-Appellee,

vs.

J. B. Stringfellow, Jr., *et al.*,
Defendants-Appellees.
Concerned Neighbors in Action,
Penny Newman,
Intervenors-Appellants
October 26, 1984

Before: WRIGHT, SKOPIL, and NORRIS, Circuit Judges.

The panel as constituted has denied the petition by appellee Montrose Chemical Corporation for reconsideration. Judges Skopil and Norris have voted to reject the *en blanc* suggestion.

The active judges of the court have considered the suggestion of *en banc* review. No judge has requested a vote on it.

The petition for reconsideration is denied and the *en banc* suggestion is rejected.

The appellants' request to publish the order of September 6, 1984, is denied. Their motion to expedite is granted.

This briefing schedule will be followed:

Appellants' opening brief will be filed by November 15, 1984. Appellees' answering briefs are due by December 7, 1984. A reply brief may be filed by December 17, 1984.

The clerk will calendar the case as soon as practicable.

The parties shall comply with page limitations established in Fed. R. App. P. 28(g). The district court is requested to forward the certificate of record as soon as practicable.

STATUTES INVOLVED

1. 28 U.S.C. § 1291:

§ 1291. Final decision of district courts

The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where direct review may be had in the Supreme Court.

2. 28 U.S.C. § 1292:

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties of admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for differences of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction —

(1) of an appeal from an interlocutory order or decree described in subsection (a) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when

any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When any judge of the United States Claims Court, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay in proceedings in the Court of International Trade or in the Claims Court, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

3. Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"):

Section 104(a)(1), 42 U.S.C. § 9604(a)(1):

(a) Removal and other remedial action by President; applicability of national contingency plan; definition

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release of substantial threat of release into the environment of any pollutant or contaminant which may present in imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare of the environment, unless the President determines that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat or release emanates, or by any other responsible party.

Section 106(a), 42 U.S.C. § 9606(a):

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an action or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States n the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

Section 107(a), 42 U.S.C. § 9607(a):

(a) Covered persons; scope

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section.

(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances

owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

4. Federal Rules of Civil Procedures, Rule 24:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless

the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403.

5. Federal Water Pollution Control Act (the "Clean Water Act" or "CWA"):

Section 311(c)(1), 33 U.S.C. § 1321(c)(1):

Removal of discharged oil or hazardous substances; National Contingency Plan

(c)(1) Whenever any oil or a hazardous substance is discharged, or there is a substantial threat of such discharge, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976) the President is authorized to act to remove or arrange for the removal of such oil or substance at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

Section 504(a), 33 U.S.C. § 1364(a):

Emergency powers.

(a) Notwithstanding any other provision of this chapter, the Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to

the welfare of persons where such endangerment is to the livelihood of such persons, such as inability to market shellfish, may bring suit on behalf of the United States in the appropriate district court of immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.

Section 505, 33 U.S.C. § 1365:

Authorization; jurisdiction

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf -

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

Notice

(b) No action may be commenced -

(1) under subsection (a)(1) of this section -

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notices under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

6. Resource Conservation and Recovery Act ("RCRA"):

Section 7002, 42 U.S.C. § 6972:

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf -

(1) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, who is alleged to abe in violation of any permit, standard, regulation, condition, requirement, or order which has effective pursuant to this chapter; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such regulation or order, or to order the Administrator to perform such act or duty as the case may be.

(b) Actions prohibited No action may be commenced under paragraph (a)(1) of this section -

(1) prior to sixty days after the plaintiff has given notice of the violation (A) to the Administrator; (B) to the State in which the alleged violation occurs; a.id (C) to any alleged violator of such permit, standard, regulation, condition, requirement, or order; or

(2) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, or in a court of the United States, any person may intervene as a matter of right.

Section 7003(a), 42 U.S.C. §6973(a):

(a) Authority to Administer

Notwithstanding any other provisions of this chapter, upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person contributing to such handling, storage, treatment, transportation or disposal to stop such handling, storage, treatment, transportation, or disposal or to take such other action as may be necessary. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

7. Safe Drinking Water Act ("SDWA"):

Section 1431(a), 42 U.S.C. § 300i(a):

Actions authorized against imminent and substantial endangerment to health.

(a) Notwithstanding any other provision of this subchapter, the Administrator, upon receipt of information that a contaminant which is present in or is likely to enter a public water system may present an imminent and substantial endangerment to the health of persons, and that appropriate State and local authorities have not acted to protect the health of such persons, may take such actions as he may deem necessary in order to protect the health of such persons. To the extent he determines it to be practicable in light of such imminent endangerment, he shall consult with the State and local authorities in order to confirm the correctness of the information on which action proposed to be taken under this subsection is based and to ascertain the action which such authorities are or will be taking. The action which the Administrator may take may include (but shall not be limited to) (1) issuing such orders as may be necessary to protect the health of persons who are or may be users of such system (including travelers), and (2) commencing a civil action for appropriate relief, including a restraining order of permanent or temporary injunction.

Section 1448, 42 U.S.C. § 300j-8:

Persons subject to civil action; jurisdiction of enforcement proceedings

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf -

(1) against any person (including (A) the United States, and (B) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution)

who is alleged to be in violation of any requirement prescribed by or under this subchapter, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this subchapter which is not discretionary with the Administrator. No action may be brought under paragraph (1) against a public water system for a violation of a requirement prescribed by or under this subchapter which occurred within the 27-month period beginning on the first day of the month in which this subchapter is enacted. The United States district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce in an action brought under this subsection any requirement prescribed by or under this subchapter or to order the Administrator to perform an act or duty described un paragraph (2), as the case may be.

Conditions for commencement of civil action; notice

(b) No civil action may be commenced -

(1) under subsection (a)(2) of this section respecting violation of a requirement prescribed by or under this subchapter -

(A) prior to sixty days after the plaintiff has given notice of such violation (i) to the Administrator, (ii) to any alleged violator of such requirement and (iii) to the State in which the violation occurs, or

(B) if the Administrator, the Attorney General, or the State has commenced and is diligently prosecuting a civil action in a court of

the United States to require compliance with such requirement, but in any such action in a court of the United States any person may intervene as a matter of right; or

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator.

Notice required by this subsection shall be given in such manner as the Administrator shall prescribe by regulation. No person may commence a civil action under subsection (a) of this section to require a State to prescribe a schedule under section 300g-4 or 300g-5 of this title for a variance or exemption, unless such person shows to the satisfaction of the court that the State has in a substantial number of cases failed to prescribe such schedules.

8. Cal. Health & Safety Code § 25358.3

Imminent or substantial public endangerment; removal or remedial actions; testing and investigatory actions and studies; contracts

(a) Whenever the director determines that there may be an imminent or substantial endangerment to the public health or welfare or to the environment, because of a release or a threatened release of a hazardous substance, the director may do any or all of the following:

(1) Order any responsible party or parties to take appropriate removal or remedial action necessary to protect the public health and safety and the environment. No order under this section shall be made to an owner of real property solely on the basis of that ownership.

(2) Take or contract for any necessary removal or remedial action.

(3) Request the Attorney General to secure relief that may be necessary to abate the danger or threat. The superior court of the county in which the threat or danger occurs shall have jurisdiction to grant therelief which the public interest and equities of the case may require.

(b) When the director determines that a release of a hazardous substance has occurred or is about to occur, the director may do any or all of the following:

(1) Undertake those investigations, monitoring, surveys, testing, and other information gathering necessary to identify the existence, source, nature, and extent of the hazardous substances involved and the extent of danger to the public health or environment.

(2) Undertake those planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations which are necessary or appropriate to plan and direct response actions, to recover thecost of those actions, and to enforce this chapter.

(c) Whenever there is a release or threatened release of a hazardous substance into the environment, the director may take or contract for any necessary removal or remedial action and may take or contract for any actions authorized by subdivision (b), in compliance with the provisions of this chapter, including, but not limited to, subdivision (b) of Section 25355.

SUBSIDIARIES AND AFFILIATES OF PETITIONERS

Subsidiaries and Affiliates of Petitioner Alumax, Inc.:

Alumax Aluminum Corporation
Alumax Aluminum Sales Corporation
Alumax Bauxite Corporation
Alumax Building Specialties Corporation
Alumax Culvert Corporation
Alumax Dispatch Corporation
Alumax Export Corporation
Alumax Extrusions, Inc.
Alumax Fabricated Products, Inc.
Alumas Foil Industrial Redevelopment Corporation
Alumax Foils, Inc.
Alumax of Georgia, Inc.
Alumax of Maryland, Inc.
Alumax Mill Products, Inc.
Alumax Mobile Home Products of Florida, Inc.
Alumax of New South Wales, Inc.
Alumax Pacific Corporation
Alumax Quebec, Inc.
Alumax Recycling Group, Inc.
Alumax Remelt Corporation
Alumax 6100 South Broadway Redevelopment Corporation
Alumax of South Carolina, Inc.

Alumax Technical Services, Inc.
Alumax Warehouse Corporation
Alumax of Washington, Inc.
Alumet Corporation
Alumet Holding Corporation
Decatur Aluminum Company, Inc.
Eastalco Aluminum Company
Eastalco Share, Inc.
Hillyard Aluminum Recovery Corporation
Homefront, Inc.
Intalco Aluminum Corporation
K & S Products, Inc.
Kawneer Company, Inc.
Kawneer France, Inc.
Mt. Holly Plantation, Inc.
Quaker State Manufacuring Company
Resource Products Corp.
Sailor Mfg., Inc.
Texas Aluminum Company, Inc.

Subsidiaries and Affiliates of BKK Corporation:

BKK Company of Nevada, Inc. (d/b/a Sun Television)
El Segundo Solid Waste Co., Inc. (d/b/a Eagle Refuse)

Subsidiaries and Affiliates of Montrose Chemical Corporation of California:

Chris Craft Industries, Inc.

Stauffer Chemical Corporation

Subsidiaries and Affiliates of Northrup Corporation:

Alabama Industries, Inc.
Construcciones Aeronauticas, S.A. (CASA)
DSD International DISC, Inc.
DSD International, Inc.
Electronica Basica, S.A. (ELBASA)
Fuller-Shuwayer Co., Ltd.
Northrop A viation Sales, Inc.
Northrop Data Systems, Inc.
Northrop Global, Inc.
Northrop Hueneme Corporation
Northrop Intercontinental, Ltd.
Northrop International Aircraft, Inc.
Northrop International Finance, N.V.
Northrop International, Inc.
Northrop International Services, Inc.
Northrop Korea Investments, Inc.
Northrop Overseas Services, Ltd.
Northrop Product Sales, Inc.
Northrop Radio Services, Inc.
Northrop Services, Inc.
Northrop Support Systems, Inc.
Northrop Technology Enterprise Co.
Northrop Universal, Ltd.
Northrop Worldwide Aircraft Services, Inc.

N.V. Koninklijke Nederlandse Vleigtuigenfabriek Fokker
Page Communications Engineers, Inc.
747 NOC I, Inc.
747 NOC II, Inc.
747 NOC III, Inc.
747 NOC IV, Inc.
Tiger Insurance Company, Ltd.
Wilcox Aviation Sales, Inc.
Wilcox Electric, Inc.
World Wide Wilcox, Inc.

Subsidiaries and Affiliates of The Deutsch Company:

Bowthorpe Holding, Limited
Compagnie Deutsch
Deutsch Aerospace Fittings Corp.
Deutsch Electromechanical Industries, Limited
Deutch Real Estate Development, Inc.
Nikko Deutsch
Permaswage S.A.
Sharir Precision Engineering, Limited
The Deutsch Company Electronic Components Division
The Deutsch Company Metal Components Division

Subsidiaries and Affiliates of Rheem Manufacturing Co.:

Rheem Canada, Inc.

Rheem Puerto Rico, Inc.
Rheem Textile Systems, Inc.
Romolus Holding Company

Subsidiaries and Affiliates of Rockwell International Corp.:

A.J. Sage and Co., Pty. Limited
Amforge, Inc.
Arpel, S.A.
Atomics International, Inc.
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Autonetica, S.A.
Autonetics, Inc.
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Brasprenas S/A
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North American Rockwell Corporation
Nottrim Services Limited
Naud Corporation
PHI Magnetronics Limited
Press Kogyo-Rockwell Co., Ltd.
Racticon Corporation
Rocketdyne Corporation
Rocketdyne, Inc.
Rockitt, Ltd.
Rockwell Aerospace & Electronics, Inc.
Rockwell (Bermuda) Ltd.
Rockwell Cerdans, S.A.
Rockwell-Collins (Australasia) Pty. Ltd.

Rockwell-Collins (Far East) Limited
Rockwell-Collins (U.K.) Limited
Rockwell-Collins de Mexico, S.A.
Rockwell-Collins de Nogales, S.A.
Rockwell-Collins France S.A.
Rockwell-Collins G.m.b.H.
Rockwell-Collins International, Inc.
Rockwell-Collins Italiana S.p.A.
Rockwell CVC OMEVI S.p.A.
Rockwell do Brasil Industria e. Comercio Ltda.
Rockwell Financial Services Corporation
Rockwell Golde G.m.b.H.
Rockwell Golde Italiana S.p.A.
Rockwell Graphic Systems Limited
Rockwell Graphic Systems, Inc.
Rockwell International Corporation
Rockwell International Credit Corporation
Rockwell International G.m.b.H.
Rockwell International Holdings Limited
Rockwell International Limited
Rockwell International Manufacturing Pte. Ltd.
Rockwell International of Canada Ltd.
Rockwell International Operations, Inc.
Rockwell International Overseas Capital Corporation
Rockwell International Overseas Corporation
Rockwell International Pension Trustees Limited
Rockwell International S.A. (France)
Rockwell International S.A. (Switzerland)

Rockwell International Sales Corporation
Rockwell International Systems, Inc.
Rockwell International Taiwan Company, Ltd.
Rockwell International Trading Company
Rockwell International Ventures, Inc.
Rockwell Limited
Rockwell Manufacturing Company
Rockwell-Maudslay Limited
Rockwell Mexicana, S.A.
Rockwell-Rimoldi da Amazonia, Industria e Comercio Limitada
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Rockwell Rimoldi France S.A.
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Sasab Ag Eschen
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S.C.I. de Sully sur Loire
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Serrature Auto Meridionali Stampi Attreature SpA.
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Wescom-Alco Associates
Wescom Leasing Corporation
Wescom (U.K.) Limited

Wilmot Breeden Australia Nominees Pty. Ltd.
Wilmot Breeden (Australia) Pty Limited
Wilmot Breeden Continental, S.A.
Wilmot Breeden Employees Trust Limited
Wilmot Breeden Group Properties Limited
Wilmot Breeden (Holdings) Limited
Wilmot Breeden International, Inc.
Wilmot Breeden Limited
Wilmot Breeden (Pressings) Limited

Subsidiaries and Affiliates of Rohr Industries, Inc.:

International Transportation Systems, Inc.
Rohr Aero Services, Inc.
Rohr Credit Corporation
Rohr Finance Corporation
Rohr France, S.A.
Rohr Industrial Systems, Inc.
Rohr Southern Industries, Inc.
San Diego Prestressed Concrete Co.
Transportation Insurance Limited

Subsidiaries and Affiliates of Weyerhauser Co.:

Camac Veneer, Inc.
Cargal Hellas E.P.E.
Cartonneries du Forez
Cartonpack, S.A.

Centennial Homes, Inc.
Chehalis Western Railroad Company
Columbia & Cowlitz Railway Company
Combustion Power Company, Inc.
Cornerstone Development Company
Curtis, Milburn and Eastern Railroad Company
de Bes' Insurance Ltd.
Descartes S.A.R.L.
DeQueen and Eastern Railroad Company
Dixieline Builders Fund Control, Inc.
Dixieline Lumber Company
Dropsy Carton S.N.C.
Duma, Inc.
Fisher Lumber Company
Golden Triangle Railroad
Great Northern Insured Annuity Corporation
Green Arrow Motor Express Company
Kennedy Bay Timber Sendirian Berhad
Marmont Realty Company
Mississippi & Skuna Valley Railroad Company
Mountain Tree Farm Company
Norpac Export Inc.
North Pacific Paper Corporation
Oregon Aqua-Foods, Inc.
Oregon, California & Eastern Railway Company
Pacific Hardwoods, Sdn. Bhd.
Pardee Construction Company
Pardee Construction Company of Nevada

Par-West Financial
Quadrant Development Limited
Quill Corporation
Scarborough Construction, Inc.
Scarborough Corporation
Seyfert International, S.A.
Shemex International B.V.
Shemin Nurseries, Inc.
Silam Forest Products Sdn. Bhd.
Societe Nouvelle des Papeteries de La Haye
Texas, Oklahoma & Eastern Railroad Company
The Baboock Company
The Capricorn Corporation
The Giddings Company
The Giddings Mortgage Investment Company
The Quadrant Corporation
Trendmaker Homes, Inc.
ver Bes' Insurance Co.
Westminster Company
Westwood Associates
Westwood Escrow Company
Westwood Insurance Agency
Westwood Insurance Agency of Arizona, Inc.
Westwood Securities Company
Westwood Shipping Lines, Inc.
Weyerhaeuser (Aust.) Pty. Ltd.
Weyerhaeuser Canada Ltd.
Weyerhaeuser Capital Corp. N.V.

Weyerhaeuser China, Ltd.
Weyerhaeuser Construction Company
Weyerhaeuser Export, Inc.
Weyerhaeuser (Far East) Limited
Weyerhaeuser GMBH
Weyerhaeuser International, Inc.
Weyerhaeuser Italia, S.R.L.
Weyerhaeuser Mortgage Company
Weyerhaeuser Mortgage Company of Arizona
Weyerhaeuser Mortgage Company of Nevada
Weyerhaeuser Mortgage Company of Texas
Weyerhaeuser Overseas Finance Company
Weyerhaeuser Real Estate Company
Weyerhaeuser Real Estate Company of Nevada
Weyerhaeuser S.A.
Weyerhaeuser (U.K.) Limited
Weyerhaeuser Venture Company
Wight Nurseries, Inc.
Winchester Homes, Inc.

SUPPLEMENTAL

BRIEF

Supreme Court, U.S.
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No. 85-184

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

J.B. STRINGFELLOW, JR.; STRINGFELLOW QUARRY COMPANY; STRINGFELLOW QUARRY COMPANY, INC.; ALUMAX INC.; BKK CORPORATION; MONTROSE CHEMICAL CORPORATION OF CALIFORNIA; NORTHROP CORPORATION; THE DEUTSCH COMPANY; POST TRANSPORTATION CO.; RAINBOW CANYON MANUFACTURING CORP.; RHEEM MANUFACTURING CO.; ROCKWELL INTERNATIONAL CORP.; ROHR INDUSTRIES, INC.; and WEYERHAEUSER CO.,

Petitioners,

vs.

CONCERNED NEIGHBORS IN ACTION and PENNY NEWMAN,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 28, 1986

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No. 85-184

IN THE
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October Term, 1985

J.B. STRINGFELLOW, JR.; STRINGFELLOW QUARRY COMPANY; STRINGFELLOW QUARRY COMPANY, INC.; ALUMAX INC.; BKK CORPORATION; MONTROSE CHEMICAL CORPORATION OF CALIFORNIA; NORTHROP CORPORATION; THE DEUTSCH COMPANY; POST TRANSPORTATION CO.; RAINBOW CANYON MANUFACTURING CORP.; RHEEM MANUFACTURING CO.; ROCKWELL INTERNATIONAL CORP.; ROHR INDUSTRIES, INC.; and WEYERHAEUSER CO.,

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Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pursuant to Rule 22.6 of the Rules of the Supreme Court, Petitioners hereby submit this supplemental brief to invite the Court's attention to the opinion entered in this matter by the Ninth Circuit Court of Appeals on February 18, 1986.[1] The Ninth Circuit's opinion, which is reproduced in the appendix hereto,[2] provides further justification for this Court to exercise its discretion to issue a writ of certiorari directed to the Ninth Circuit and to reverse or vacate the decision of the Ninth Circuit.

I

The Ninth Circuit's Opinion Offers No Justification For The Conflict Between The Ninth Circuit's Jurisdictional Decision And The Decisions Of This Court And Three Other Circuits

As set forth more fully in the Petition For a Writ of Certiorari filed herein, three different circuit courts of appeals have held that orders granting permissive intervention but denying intervention as of right are not appealable orders under 28 U.S.C. § 1291. *See*, Petition For a Writ of Certiorari to the United States Court of Appeals

[1] The Ninth Circuit entered its judgment in this action on March 18, 1985, in the form of a two paragraph order which simply announced the result reached by the Ninth Circuit. In the March 18, 1985 Order, the Ninth Circuit stated that its opinion would follow. A Petition for a Writ of Certiorari was filed with this Court shortly before the jurisdictional time limit for seeking review of the March 18, 1985 judgment expired in July, 1985.

[2] The Ninth Circuit's February 18, 1986 Opinion was certified for publication but has not yet appeared in the Federal Reporter.

for the Ninth Circuit, dated July 30, 1985 [hereinafter "Pet. Cert."] at 11-18 *citing Kartell v. Blue Shield*, 687 F.2d 543 (1st Cir. 1982); *Shore v. Parklane Hosiery Co., Inc.*, 606 F.2d 354 (2d Cir. 1979); *Wheeler v. American Home Products Corp.*, 582 F.2d 891 (5th Cir. 1977). Such holdings follow directly from this Court's analysis in *Brotherhood of Railroad Trainmen v. Baltimore of Ohio R.R.*, 331 U.S. 519 (1947), and from the collateral order standards set forth in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

Confronted with the conflict between the judgment of the Ninth Circuit in this action and the law established by this Court and three other circuits, the Ninth Circuit, in its February 18, 1986 opinion, makes an astonishing election. In its opinion, the Ninth Circuit elects not to offer any rationale as to why its rule of law is more reasoned than that established elsewhere; it elects not to try to distinguish this case from others previously decided; and it elects not to offer any rationale for modifying or adjusting the law established by this Court and by three other circuit courts of appeals. Instead, it elects to ignore all non-Ninth Circuit decisions and to ignore any obligation to explain the conflict created by its decision in this action. Indeed, the Ninth Circuit ignores *Brotherhood*, *Coopers & Lybrand*, *Kartell*, *Shore* and *Wheeler* altogether, citing only a single Ninth Circuit decision — *California v. Block*, 690 F.2d 753, 776 (9th Cir. 1982), which also ignores *Brotherhood* and its progeny — in support of its judgment. Thus, the Ninth Circuit opines simply, "we have previously held that an order denying intervention as of right is a final appealable order, notwithstanding a simultaneous grant of permissive intervention, *California v. Block*, 690 F.2d 753, 776 (9th Cir. 1982), and are bound by that holding." Appendix to Petitioners' Supplemental Brief in Support of Petition For a

Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit ["App."] at A-10, A-11.

By blindly adhering to *Block* (and by refusing to reconsider the rule of *Block en banc*, as requested by petitioners), the Ninth Circuit has created an inconsistency between Ninth Circuit decisions and the decisions of this Court, and a direct conflict between Ninth Circuit decisions and the decisions of three other circuit courts of appeals.

After the Ninth Circuit entered its March 18, 1985 judgment in this action, this Court, in *Richardson-Merrell, Inc. v. Koller*, — U.S. —, 105 S. Ct. 2757 (1985), again examined and applied the collateral order standards of *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). In *Koller*, this Court held that orders disqualifying counsel in civil cases are not appealable. In so holding, the Court reconfirmed that "[t]he collateral order doctrine is a 'narrow exception' [to the final judgment standard of 28 U.S.C. § 1291] whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal." — U.S. at —; 105 S. Ct. at 2761 *quoting Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). Consistent with its election to ignore *Brotherhood, Coopers & Lybrand* and the relevant decisions from the various circuit courts of appeal, the Ninth Circuit's February 18, 1986 opinion does not acknowledge or make any effort to square its March 18, 1985 judgment with this Court's analysis in *Koller*.

Petitioners respectfully submit that this is a case that so plainly and inexplicably departs from established law that it cries out for the issuance of a writ of certiorari, and possibly, a summary reversal. At a minimum, a writ of certiorari should be used, and the case remanded to the Ninth Circuit for further consideration in light of *Koller*.

II

The Ninth Circuit's Opinion Departs From The Intervention Standards Established By This Court And By Other Circuits

The Ninth Circuit's February 18, 1986 opinion creates (or perpetuates) two major inconsistencies between the law of the Ninth Circuit and the holdings of this Court and of other circuit courts of appeal. The first conflict exists because the Ninth Circuit held that intervention orders under Rule 24(a)(2) of the Federal Rules of Civil Procedure ("Rule 24(a)(2)") are reviewed under a *de novo* standard while this Court and other circuit courts of appeal review such orders under an abuse of discretion standard.

The second conflict created by the Ninth Circuit relates to the burden that members of the public bear in showing inadequacy of representation by federal and state governments in actions commenced by such governments to protect and assert public rights. The Ninth Circuit held that the burden of showing inadequacy of representation under Rule 24(a)(2) in such cases is satisfied if the applicant for intervention makes the "minimal" showing that the representation "may be" inadequate, while other courts of appeals have held that a presumption of adequate representation exists in such cases and that the burden is satisfied only by "a strong affirmative showing that the sovereign is not fairly representing the interests of the applicant." *Compare, U.S. v. Stringfellow*, App. at A-16 *with United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 985 (2nd Cir. 1984).

A. The Ninth Circuit's Use Of A *De Novo* Standard Of Review Conflicts With The Abuse Of Discretion Standard Of Review Adopted By This Court And Other Circuits

In its February 18, 1986 opinion, the Ninth Circuit held that orders granting or denying intervention under Rule 24(a)(2) are reviewed under a *de novo* standard of review. App. at A-12. This holding is inconsistent with the decisions of this Court and other circuits.

This Court has held specifically that an order denying, on timeliness grounds, a Rule 24 motion to intervene must not be set aside by a reviewing court absent an abuse of discretion. *NAACP v. New York*, 413 U.S. 345, 366 (1973) ("[Timeliness under Rule 24] is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.") Timeliness, like inadequacy of representation, is one of the four prongs of the Rule 24(a)(2) intervention standard.

Moreover, at least three circuit courts of appeal have held that orders denying Rule 24(a)(2) intervention on any grounds, including adequacy of representation, must be reviewed under an abuse of discretion standard. *See, e.g., United States v. Hooker Chemical & Plastics Corp.*, 749 F.2d 968, 990 (2d Cir. 1984) ("it is now the rule in this circuit that denials of motions to intervene as of right under Rule 24(a)(2) also are to be reviewed under an abuse of discretion standard"); *Virginia v. Westinghouse Electric Corp.*, 542 F.2d 214, 216 (4th Cir. 1976); ("The test on review [of an order denying intervention under Rule 24(a)(2)] is whether the district judge abused his discretion in denying the motion for intervention"); *EEOC v. United*

Airlines, 515 F.2d 946, 950 (7th Cir. 1975) ("we find no abuse of discretion in the District Court's conclusion that the appellants' interests are adequately represented").

The Ninth Circuit's unexplained departure from the abuse of discretion standard creates inconsistency and uncertainty in the law relating to intervention under Rule 24. A writ of certiorari should be issued in this case to secure uniformity and consistency of law throughout the nation on this issue.

B. The Standard Used By The Ninth Circuit For Determining Adequacy Of Representation Under Federal Rule of Civil Procedure Rule 24(a)(2) Is Inconsistent With The Established Standard Used Everywhere Outside The Ninth Circuit

In its February 18, 1986 opinion, the Ninth Circuit held that the burden borne by a citizen to show inadequacy of representation by the federal and state governments in an action commenced by such governments to assert public rights is satisfied if the citizen makes a "minimal" showing that the existing representation "may be" inadequate. App. at A-16. As recognized by the Ninth Circuit, this standard "clearly conflicts" with the standard applied in other circuits. App. at A-16.

Indeed, every circuit (other than the Ninth Circuit) that has considered this issue has recognized something akin to a "presumption of adequate representation" in cases where the government sues in its *parens patriae* capacity and has acknowledged the more "stringent burden" placed on applicants for intervention in such cases. *See, e.g., United States v. Hooker Chemical & Plastics Corp.*, 749 F.2d 968,

985 (2d Cir. 1984) ("we agree with the Third, Fifth and District of Columbia Circuits that, in litigation of this sort, a greater showing that representation is inadequate should be required"); *New Orleans Public Services, Inc. v. United Gas Pipe Line Co.*, 690 F.2d 1203, 1213 & n.7 (5th Cir. 1982) (citing, with approval, a District of Columbia circuit case for the proposition that 'where governmental parties are already present in case, private parties must make more than a minimal showing of inadequate representation"); *Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979) ("to intervene in a suit in district court in which a state is already a party, a citizen or subdivision of that state . . . must demonstrate that its interest is in fact different from that of the state and that that interest will not be represented by the state"); *Pennsylvania v. Rizzo*, 530 F.2d 501, (3rd Cir.), *cert. denied sub nom. Fire Officers Union v. Pennsylvania*, 426 U.S. 921 (1976) ("a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee").

The Ninth Circuit's desire to justify the result announced in its March 18, 1985 order has created a standard for intervention under Rule 24(a)(2) in the Ninth Circuit that is radically different from the standard used everywhere else in the nation. The Ninth Circuit's standard is *not* one that was compelled by application of logic or public policies to a pending case; rather, it is an after-the-fact standard created to explain an otherwise inexplicable result in a case decided a full year ago. The Ninth Circuit's standard, and the opinion which created it, will cause nationwide uncertainties and inconsistencies in all cases involving intervention under Rule 24. For this reason, and for the other reasons set forth in the Petition For a Writ of Certiorari on file herein, a writ of certiorari should be issued in this action.

III

CONCLUSION

Petitioners respectfully request that a writ of certiorari be issued and the decision of the Ninth Circuit reversed or vacated.

Respectfully submitted,

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APPENDIX

The following parties join in the filing of this Supplemental Brief:

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For Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS
No. 84-5684
D.C. NO. CV-83-2501-MML

UNITED STATES OF AMERICA, et al.,
Plaintiff-Appellees,

vs.

J.B. STRINGFELLOW, Jr., et al.,
Defendants-Appellees,

CONCERNED NEIGHBORS IN ACTION and PENNY NEWMAN,
Intervenors-Appellants.

OPINION

Appeal from the United States District Court
for the Central District of California
Malcolm M. Lucas, District Judge, Presiding

Argued and Submitted March 6, 1985
Pasadena, California

Before: GOODWIN and REINHARDT, Circuit Judges, and SOLOMON, District Judge*

REINHARDT, Circuit Judge:

Concerned Neighbors in Action ("CNA") and its chairwoman, Penny Newman, appeal the district court's denial of their motion to intervene as of right in an action brought by the United States and the State of California against thirty-one parties who are allegedly responsible for release of hazardous wastes from the Stringfellow Acid Pits. We conclude that the district court erred in finding that appellants failed to meet the requirements of intervention under Fed. R. Civ. P. 24(a)(2). [1]

I. FACTUAL BACKGROUND

CNA is a nonprofit organization consisting of over 400 residents of Glen Avon, California and its surrounding communities. The organization was founded in 1979 in response to releases of hazardous wastes from Stringfellow. CNA was formed to ensure adequate clean-up of the acid

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* Gus Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

[1] On March 18, 1985, we issued an order reversing the court's denial of appellants' motion and directing the court to grant appellants leave to intervene as of right. We stated in that order that we would file an opinion at a later date.

pits; to monitor the performance of government agencies involved in clean-up efforts; and to protect the health and well-being of its members who, according to appellants, have all been exposed to hazardous wastes deposited at Stringfellow. Penny Newman, in addition to being the chairwoman of CNA, is a resident of Glen Avon.

Stringfellow is a 20-acre hazardous waste disposal site constructed by the State of California and located one mile from Glen Avon. According to appellants' proposed complaint in intervention, dumping of hazardous waste into the acid pits began in 1956 and continued until closure of the site in 1972. During this period, approximately 34 million gallons of hazardous wastes were dumped into the site by more than two hundred parties, including agencies of the federal government.

As early as 1969, it became apparent that the hazardous waste was not being confined to the site and was escaping into the adjacent Pyrite Creek through which surface water flows down into the community of Glen Avon. In March, 1969, heavy rains caused the site to overflow, discharging contaminated water into Glen Avon. Heavy rainfall during the winter of 1977-78 caused similar overflowing. In 1978, the State of California released 800,000 gallons of contaminated water into Pyrite Creek, which in turn drained into the Streets of Glen Avon. Additional flooding resulted from heavy rains in 1979 and 1982.

In April, 1983, the United States and the State of California brought suit against thirty-one defendants, including the former owners of the site and other private parties who generated or transported wastes which were dumped at the site ("the waste-generators"). The two governmental entities sought to enjoin the release of hazardous wastes from Stringfellow pursuant to the

"imminent hazard" provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9657 (1982); the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376 (1982); the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6986 (1982); and the Safe Drinking Water ACT ("SDWA"), 42 U.S.C. §§ 300f-300j-10 (1982). They also asserted claims for cost recovery pursuant to both state and federal law.[2]

In July, 1983, CNA and Newman (hereinafter collectively referred to as "CNA") moved to intervene as of right, pursuant to Fed. R. Civ. P. 24 (a)(1) and 24(a)(2). In the alternative, CNA moved to intervene permissively, pursuant to Fed. R. Civ. P 24(b). In its complaint in intervention, CNA asserted claims against the plaintiff state and federal governments as well as the thirty-one waste generators named as defendants in the existing action. In addition to joining in the plaintiffs' claims for relief, CNA sought additional injunctive relief against both the plaintiffs and the defendants, including permanent abatement of the hazard by total removal of the hazardous substances from the site, and the conducting of health studies.

The district court denied CNA's motion to intervene as of right, concluding that neither Rule 24(a)(1) nor Rule 24(a)(2) provided a basis upon which to grant intervention. With respect to Rule 24(a)(1), which provides for intervention as of right "when a statute of the United States confers an unconditional right to intervene," the district court reasoned that although the "citizen suit" provisions of

[2] In August, 1983, several waste-generators asserted counterclaims against both governmental parties.

the SDWA, the RCRA and the CWA provide for citizen intervention as of right in certain types of actions, these statutory rights of intervention do not apply to suits such as this which have been brought by the United States pursuant to the "emergency powers" provision of the SDWA, the "imminent hazard" provision of the RCRA, and the "emergency relief" provision of the CWA. Accordingly, the court concluded that Rule 24(a)(1) did not authorize CNA to intervene.

The district court also denied CNA's motion under Rule 24(a)(2). Rule 24(a)(2) provides for intervention as of right

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The district court concluded that CNA had failed to show that it would be practically disadvantaged by disposition of the litigation or that the existing parties would not adequately represent its interests.

Notwithstanding its denial of CNA's motion to intervene as of right, the district court granted CNA leave to intervene permissively, reasoning that since CNA's proposed complaint in intervention and the complaint filed by the United States and California raised common questions of fact and law, permissive intervention was appropriate. However, the court imposed conditions upon its grant of permissive intervention. CNA claims that those conditions severely limit its ability to influence the results of the litigation. Specifically, the district court's order prohibited appellant from (1) asserting any claims not

already asserted by the original parties; (2) intervening in the original parties' cost recovery claims; and (3) initiating any motion or discovery, unless appellant had conferred with the original parties and had secured the concurrence of at least one of them in the proposed motion or discovery.

II. ISSUES ON APPEAL

In this appeal, CNA raises two issues, only one of which we need address. First, it contends that the district court's determination that it failed to make the requisite showing under Rule 24(a)(2) was erroneous. Second, and in the alternative, it contends that the district court erred in finding that the statutes pursuant to which the original plaintiffs brought this action confer upon it no right of intervention. Because we reverse the district court's denial of intervention under Rule 24(a)(2), we do not rule on appellant's statutory right of intervention claim.

III. APPEALABILITY OF THE DISTRICT COURT'S ORDER

The waste-generators challenge our jurisdiction over this appeal. They contend that an order denying intervention as of right but granting permissive intervention is not a "final decision" within the meaning of 28 U.S.C. § 1291 (1982), and hence is not appealable. They also contend that because appellant availed itself of the benefits of permissive intervention by filing briefs and pleadings, it is, in effect, estopped from appealing the district court's denial of its motion to intervene as of right.

We reject the waste-generators' contentions. First, we have previously held that an order denying intervention as of right is a final appealable order, notwithstanding a

simultaneous grant of permissive intervention, *California v. Block*, 690 F.2d 753, 776 (9th Cir. 1982), and are bound by that holding. [3] Second, CNA's participation in the litigation as a permissive intervenor does not estop it from timely appealing that portion of the order denying intervention as of right. [4] A party is not required to reject the benefits of a judgment it deems inadequate in order to preserve its right to appeal, so long as the party does not consent to the judgment. *United States v. Hougham*, 364 U.S. 310, 312 (1960); *United States for Use & Benefit of H & S Industries, Inc. v. F.D. Rich Co.*, 525 F.2d 760, 764-65 (7th Cir. 1975); *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.*, 414 F.2d 750, 752 (9th Cir. 1969); 9 J. Moore & B. Ward, *Moore's Federal Practice* ¶ 203.06, at 3-26 (2d ed. 1985). Here, although it may have unwillingly participated in the litigation as a permissive intervenor, CNA made it clear that it was not consenting to the denial of its right to intervene under Rule 24(a)(2). Moreover, to

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[3] The governments and several of the waste-generators originally moved, before a motions panel of this court, to dismiss CNA's appeal for lack of jurisdiction. Neither party brought *California v. Block, supra* to that panel's attention, due to the fact that the case is not annotated under Rule 24. The panel decided the jurisdictional issue against CNA, dismissed the appeal and issued an opinion for publication. CNA then moved for rehearing on the ground that the order of dismissal was in conflict with *Block*. The panel agreed. It withdrew its opinion, held that we had jurisdiction over CNA's appeal and ordered, in an unpublished memorandum, that the appeal be calendared for a hearing on the merits.

[4] We note that CNA, unlike the applicant in *Block*, has demonstrated that its limited status as a permissive intervenor impedes its ability to fully prosecute its claims. In *Block*, we stated that the applicant had failed to show with any specificity that it was prejudiced by the court's actions in granting it permissive intervention status.

hold otherwise would force CNA to give up one important right in order to preserve another.

IV. THE DISTRICT COURT'S DENIAL OF APPELLANTS' MOTION TO INTERVENE AS OF RIGHT UNDER RULE 24(a)(2)

A. Standard of Review

Although the waste-generators contend that the district court's denial of appellant's motion to intervene as of right should be reviewed for an abuse of discretion, we traditionally conduct a *de novo* review of such orders. *See, e.g., Sagebrush Rebellion, Inc., v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983); *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627, 629-30 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *Smith v. Pangilinan*, 651 F.2d 1320 (9th Cir. 1981); *Idaho v. Freeman*, 625 F.2d 886, 887 (9th Cir. 1980); *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980); *Legal Aid Society v. Dunlop*, 618 F.2d 48, 49-50 (9th Cir. 1980); *Johnson v. San Francisco United School District*, 500 F.2d 349, 352-54 (9th Cir. 1974). We do so because our review of the district court's decision involves application of a rule of law to the established facts, and because the issue primarily involves consideration of legal concepts in the mix of fact and law. *See United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.) (en banc), *cert. denied*, 105 S. Ct. 101 (1984). *See also* 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1902 (1972).

B. The Validity of the District Court's Decision

Rule 24 is broadly construed in favor of applicants for intervention. *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982); 7A C. Wright & A. Miller, *supra*, § 1904. We have adopted a four-part test to determine whether applications for intervention as of right pursuant to Rule 24(a)(2) should be granted. An order granting intervention as of right is appropriate if (1) the applicant's motion is timely; (2) the applicant has asserted an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that without intervention the disposition may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant's interest is not adequately represented by the existing parties. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d at 527; *County of Fresno v. Andrus*, 622 F.2d at 438. In applying this test we are guided primarily by practical considerations. *See* Fed. R. Civ. P. 24(a)(2) advisory committee note ("if an [applicant] would be substantially affected in a practical sense by the determination made in an action, [the applicant] should, as a general rule, be entitled to intervene . . . . "). The parties dispute neither the timeliness of CNA's application nor its interest in the property at issue. Accordingly, we will address only the remaining two parts of the test.

1. Extent to which denial of appellant's motion to intervene as of right impairs its ability to protect its interest.

In support of its showing that disposition of this action may have a practical adverse impact on its interests, CNA points to the effect that any decision in this case would have on subsequent claims it might bring against the original parties. CNA correctly points out that "[u]nder the doctrine of stare decisis, appellate rulings of law become controlling precedent and, consequently, affect the rights of future litigants." *McConney*, 728 F.2d at 1201. In light of this potential stare decisis effect, CNA contends that its absence from this litigation could, as a practical matter, result in its being precluded from litigating several of its claims against the governmental parties. [5] We agree.

The prospect of stare decisis may, under certain circumstances, supply the requisite practical impairment warranting intervention as of right. *Smith v. Pangilinan*, 651 F.2d 1320, 1325 (9th Cir. 1981); *see also Atlantis Development Corp. v. United States*, 379 F.2d 818, 826-29 (5th Cir. 1967); 7A C. Wright & A. Miller, *supra*, § 1908 at

[5] The issues, the determination of which might affect any suit appellant might subsequently bring against appellees, include (1) the causal relationships between the parties and the current conditions at the dumpsite; (2) the liability of each party under the various environmental statutes and common law causes of action, including the liability of the responsible government agencies; (3) the availability of certain alleged statutory and equitable defenses to liability; (4) the liability of certain individuals on an alter ego theory for the actions of corporate entities under their control; and (5) the remedies avaliable under the relevant statutory schemes.

515-17. Here, because of the issues of fact and law that are common to (1) CNA's complaint in intervention, (2) the governments' original complaint and (3) the waste-generators' counterclaims, resolution of the liability questions would, as a practical matter, bear significantly on the resolution of CNA's claims against any of the original parties in a subsequent related action. *Cf. Atlantis Development Corp. v. United States*, 379 F.2d at 826-29.

Our analysis is also influenced by the divergent remedial schemes sought by the original parties and CNA. In addition to abatement of the hazardous waste releases from the Stringfellow site and reimbursement for funds expended in response to the imminent hazard sought by the original plaintiffs, CNA seeks to obtain additional injunctive relief against the 31 named waste generators and the original plaintiffs, including permanent abatement of the hazard by removal of all hazardous substances from the site. In addition, CNA seeks the inclusion of health studies in any remedial program devised as a result of this litigation.

The disposition of the present litigation will, as a practical matter, establish the applicable remedial scheme. CNA has a palpable interest in that scheme. Where, as here, a prospective intervenor has demonstrated a clear interest in the remedial scheme, and where the prospective intervenor seeks to obtain remedies that differ from those sought by the original plaintiffs, it is reasonable to conclude that disposition of the litigation may impair the prospective intervenor's ability to protect its interests. That the remedy established in the present litigation may be challenged in a subsequent action does not detract from our conclusion. *See Johnson v. San Francisco United School District*, 500 F.2d at 353 (where, in desegregation action brought by parents of black children, remedy sought by plaintiffs would affect

interests of Chinese children, threat of impairment held sufficient to warrant intervention despite ability of intervenors to challenge adopted remedy in subsequent lawsuit); *Natural Resources Defense Council, Inc. v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977) ("it is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation").

Because of the possible *stare decisis* effect of this litigation, and because of CNA's palpable interest in the remedial scheme, we hold that CNA has adequately demonstrated that disposition of the litigation may, as a practical matter, impair its ability to protect its interests.

2. Adequacy of Representation by Existing Parties

Finally, we must determine whether CNA's interest in this litigation can be represented adequately by the original plaintiffs. In finding that the original plaintiffs adequately represented CNA's interests, the district court applied the standard of *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 987 (2d Cir. 1984), under which an applicant must make a "strong showing" of inadequate representation when the purported representative is a state or the federal government. However, this standard clearly conflicts with the law of this circuit. Consistent with *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538-39 (1972), where the government was the purported representative, we have held that "the requirement of inadequacy of representation is satisfied if the applicant shows that representation of its interests 'may be' inadequate and . . . the burden of making that showing is minimal." *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d at

528; *see also Legal Aid Society v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980); *Johnson*, 500 F.2d at 353-54.

In evaluating whether there exists an original party that will adequately represent CNA's interests, we consider three factors: whether the interests of a present party to the suit are such that it will undoubtedly make all of the intervenor's arguments; whether the present party is able and willing to make such arguments; and whether the intervenor would offer any necessary element to the proceedings that the other parties would neglect. *County of Fresno v. Andrus*, 622 F.2d 436, 438-39 (9th Cir. 1980); *Blake v. Pallan*, 554 F.2d 947, 954-55 (9th Cir. 1977).

Because the thirty-one generators have brought counterclaims on the issue of liability against the original plaintiffs, the district court reasoned that each of the relevant factors weighs in favor of adequate representation. The district court concluded that *either* the original plaintiffs *or* the original defendants possessed interests such that CNA's arguments would undoubtedly be made; that *either* the original plaintiffs *or* the original defendants would be able and willing to make these arguments; and that because of the relative positions of the original parties, intervention by CNA would not contribute any necessary element to the proceedings that would otherwise be neglected. The district court's analysis is defective.

When a party possesses interests adverse to those of a prospective intervenor, the party cannot adequately represent the intervenor's interests. *See Sanguine, Ltd. v. United States Department of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984) (an applicant may meet burden of showing inadequate representation by showing that the representative has an interest adverse to the applicant); *Stadin v. Union Electric Co.*, 309 F.2d 912, 919 (8th Cir. 1962)

(same); 7A Wright & Miller, *supra*, §-1909 at 524-25 (absentee cannot be required to look for adequate representation from an opponent; if all existing parties are adverse, then absentee is not adequately represented); *cf. United States v. Board of School Commissioners, Indianapolis, Indiana*, 466 F.2d 573, 575 (7th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973) (representation is adequate if, *inter alia*, representative does not have or represent an interest adverse to the proposed intervenor); *Sagebrush Rebellion, Inc. v. Watt*, *supra*, 713 F.2d at 528 (that defendant representative had previously been head of plaintiff organization raised question concerning adequacy of representation sufficient to support intervention). Although the original plaintiffs and defendants certainly have an interest in attempting to place the blame on each other, it does not necessarily follow that CNA's claims will be prosecuted as vigorously as they would be if CNA were granted leave to intervene as of right. First, by engaging in independent discovery CNA might uncover facts that would affect the remedy in a manner favorable to it or would materially influence the settlement. Secondly, each party may be reluctant to advance an argument that would support a finding of liability against its opponent, but might, at the same time, expose that party to an increased risk of liability. Finally, where, as here, a third party seeks to press claims against both the plaintiffs and the defendants in ongoing litigation, there exists a genuine possibility that, in the absence of intervention, the existing parties will "bargain away" the third party's interests rather than vigorously represent those interests at the possible expense of their own liability. Indeed, should settlement become a viable alternative in this litigation, it is highly unlikely that this "division of representation" would result in a settlement that would adequately address CNA's interests.

Moreover, CNA seeks to proceed on the theory that plaintiffs and defendants are jointly and severally liable. As a practical matter, neither plaintiffs nor defendants, who respectively seek to impose liability exclusively on the opposing party, will represent this particular interest.

Finally, CNA seeks remedies that neither existing party has contemplated. Thus, even were we to credit the district court's novel "division of representation" theory, it would not dispose of the issue of representation with respect to devising an appropriate remedy.

We conclude that CNA has carried its "minimal burden" with respect to a showing that its interest might be inadequately represented.[6] Because of our finding that CNA is entitled to intervene under Rule 24(a)(2), we do not rule on the question of its statutory right to intervene under Rule 24(a)(1). We note, however, the persuasiveness of its argument that it is afforded such a right under the citizen suit provision of the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6972 (West Supp. 1985).[7]

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[6] Moreover, CNA would in all likelihood meet the "strong showing" standard of *United States v. Hooker Chemicals & Plastics Corp.*, *supra*, if that standard were applicable. Because CNA seeks to bring claims against the United States and the State of California, its interests are adverse to those of the plaintiff governments. Whether or not the state and federal plaintiffs are characterized as suing in *parens patriae*, the fact remains that they oppose certain claims that CNA seeks to assert. This case is thus clearly distinguishable from *Hooker*, in which the applicants' interests were not adverse to those of the plaintiff government. We note as well that if CNA's argument for citizen intervention in government-initiated imminent hazard actions under RCRA is correct, *see infra* at 16-17, RCRA itself negates *Hooker's* presumption that governmental representation in such actions is adequate.

[7] In support of its claim of a statutory right to intervene, CNA argues

We reverse that portion of the district court's order denying intervention as of right; vacate that portion of the order granting CNA the right to intervene permissively; and remand the matter with instructions to grant CNA leave to intervene as of right.

REVERSED AND REMANDED

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that Congress intended the 1984 amendments to RCRA, which were enacted subsequent to the initiation of appellant's suit, to clarify citizens' rights under existing law to intervene in government-initiated imminent hazard actions. *See* 130 *Cong. Rec.* S9152 (daily ed. July 25, 1984) (statement of Sen. Mitchell); S. Rep. No. 98-284, 98th Cong., 1st Sess. 56 (1983). The Senate version of the amendments explicitly provided for such intervention. 130 *Cong. Rec.* S9208-09 (daily ed. July 25, 1984). The Conference Committee imposed limitations upon citizens' right to commence imminent hazard actions in addition to those of the Senate version, and restructured section 6972 in accordance with those additional limitations. The revised structure altered the reference of the intervention subsection, 42 U.S.C. § 6972(b)(2)(E), so that that subsection now authorizes intervention in *citizen-initiated* imminent hazard actions, while omitting reference to *government-initiated* imminent hazard actions. CNA argues that the apparent elimination of the right to intervene in government suits was inadvertent, since such elimination would be contrary to the stated legislative purpose of the 1984 amendments. CNA further contends that we should interpret the 1984 amended citizen suit provision consistently with evident Congressional intent, rather than according to its literal terms, *see Barnes v. Donovan*, 720 F.2d 1111, 1113-14 (9th Cir. 1983); *Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868, 872 (9th Cir. 981); *United States v. Babcock*, 530 F.2d 1051, 1053 (D.C. Cir. 1976), and that that intent clarifies the law existing at the time this suit was commenced, *see May Department Stores Co. v. Smith*, 572 F.2d 1275, 1278 (8th Cir.) (*per curiam*), *cert. denied*, 439 U.S. 837 (1978); *In re Adams*, 761 F.2d 1422, 1427 (9th Cir. 1985). Although CNA's position appears to have considerable merit, we do not now decide its validity.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
MAY 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-184 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1985

J.B. STRINGFELLOW, JR., ET AL., PETITIONERS

v.

CONCERNED NEIGHBORS IN ACTION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a district court order granting permissive intervention, but denying intervention as of right, is immediately appealable to the court of appeals.

2. Whether the court of appeals erroneously held that certain private parties were entitled to intervene as of right in an action brought by the United States and the State of California seeking to abate and clean up a waste disposal site.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-184

J.B. STRINGFELLOW, JR., ET AL., PETITIONERS

v.

CONCERNED NEIGHBORS IN ACTION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The initial opinion of the court of appeals dismissing the appeal for want of appellate jurisdiction (Pet. App. A22-A25) is unreported. The second opinion, withdrawing the initial opinion (Pet. App. A26-A27), is unreported. The order of the court of appeals reversing in part and vacating in part an order of the district court, and remanding the case to the district court (Pet. App. A1-A2) is reported at 755 F.2d 1383. The final opinion of the court of appeals (Pet. Supp. Br. App. A5-A20) is reported at

783 F.2d 821. The opinion of the district court (Pet. App. A3-A21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1985. On May 30, 1985, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including August 1, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

1. Petitioners are defendants in an action brought by the respondents United States and the State of California to abate the release of hazardous substances from the Stringfellow Acid Pits, an abandoned toxic waste disposal site near Riverside, California. The suit, originally filed on April 21, 1983, names 28 persons, corporations, or entities as defendants who either generated or transported wastes that were dumped at Stringfellow Acid Pits or who owned or operated the pits during the period of dumping (E.R. 356-367).[1] Some of the defendants have counterclaimed against a variety of state agencies and the United States Air Force and Navy (E.R. 614). In addition, some of the defendants have filed third-party complaints naming more than 100 entities as third-party defendants (E.R. 613).

As amended, the complaint alleges 11 separate claims for relief, but the relief sought falls into only two general categories. First, under the "imminent and substantial endangerment" provisions of the applicable federal environmental statutes and under

[1] E.R. refers to the Excerpts of Record filed in the court of appeals.

California tort law,[2] the complaint seeks an injunction requiring the defendants to "abate the release and threatened release of hazardous substances" and to "undertake such action as may be necessary to remedy the conditions which have caused or may contribute to or present an imminent and substantial endangerment to the public health, welfare and the environment" (E.R. 400-401). The second form of relief sought by the plaintiff governments is reimbursement of the funds spent by the United States and the State of California for response, removal, and remedial costs and for damage to natural resources.[3]

2. On July 15, 1983, respondents Concerned Neighbors in Action, a nonprofit corporation, and Penny Newman sought leave to intervene (E.R. 55, 108).[4] Respondents claimed that they had the right to intervene pursuant to Fed. R. Civ. P. 24(a)(1), on the basis of the citizens suit provisions of the various federal environmental statutes that are involved

[2] Section 504 of the Clean Water Act (CWA), 33 U.S.C. 1364; Section 1431 of the Safe Drinking Water Act (SDWA), 42 U.S.C. 300i; Section 7003 of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. (& Supp. II) 6973; Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9606(a); Cal. Health & Safety Code § 205 (West 1979); Cal. Civ. Code §§ 3479-3496 (West 1970 & Supp. 1986).

[3] Section 311 of the CWA, 33 U.S.C. (& Supp. II) 1321; Section 107(a) of CERCLA, 42 U.S.C. 9607(a); Cal. Health & Safety Code §§ 25300-25395 (West 1984 & Supp. 1986).

[4] Although the United States and the State of California are also respondents to the petition under Sup. Ct. R. 19.6, we will hereinafter refer to Concerned Neighbors in Action and Penny Newman as respondents.

in this suit (E.R. 67).[5] Alternatively, they argued that they were entitled to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2), because they had interests which could be practically impaired by this suit and because their representation by the existing parties was inadequate (E.R. 70-82). Finally, respondents asserted that they should be permitted to intervene pursuant to Fed. R. Civ. P. 24(b) because they sought to raise claims that have common questions of law and fact with those already presented by the government plaintiffs in this case (E.R. 83). The proposed complaint in intervention (E.R. 99) named the same defendants as does the government plaintiffs' complaint, and the first nine claims for relief parallel those of the government plaintiffs (E.R. 146-165). The remaining eight claims for relief (Numbers 10-17), however, present claims that had not already been plead by the governmental plaintiffs.[6]

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[5] CWA, 33 U.S.C. 1365(b)(1)(B); SDWA, 42 U.S.C. 300j-8(b)(1)(B); and RCRA, 42 U.S.C. (Supp. II) 6972(b)(2).

[6] The tenth, eleventh, and twelfth claims were brought pursuant to the citizens suit provisions of CWA, SDWA, RCRA (33 U.S.C. 1365; 42 U.S.C. 300j; 42 U.S.C. (& Supp. II) 6972) and allege that the defendants and so-called third-party defendants had violated certain regulatory provisions or requirements promulgated under those Acts (E.R. 165-171). The thirteenth and fourteenth claims for relief allege public and private nuisance and apparently claim a cause of action on such a theory against the Air Force under the Federal Torts Claims Act (E.R. 171-175). The fifteenth and sixteenth are apparently claims sounding in state tort law under negligence and strict liability theories (E.R. 175-177). The seventeenth is an action for inverse condemnation against the State of California for taking Penny Newman's property without just compensation. Federal jurisdiction for this claim is alleged under 42 U.S.C. 1983 (E.R. 178).

The government plaintiffs supported respondents' motion to intervene insofar as they sought permissive intervention under Rule 24(b), on the condition that the respondents should be permitted to raise and address only those claims that had already been asserted by the plaintiffs and defendants (E.R. 254). The government plaintiffs opposed respondents' motion to intervene as a matter of right, and suggested that, should the court grant intervention as of right pursuant to Rule 24(a), "it should place the same conditions on the intervention as of right" as the plaintiffs proposed for permissive intervention (E.R. 254).

Several of the petitioners also opposed intervention as of right but suggested that permissive intervention could be granted if certain conditions were imposed (E.R. 228). The conditions suggested by petitioners were more extensive than those requested by the plaintiff governments. In addition to limiting the claims to those raised by the original parties, petitioners sought to deny intervenors the opportunity to participate in the cost recovery aspects of the litigation and to limit their participation to the remedial aspects of the case (E.R. 235-236). The petitioners also requested limitations on discovery and motions initiated by respondents (E.R. 237-238).

3. The district court granted respondents permission to intervene pursuant to Fed. R. Civ. P. 24(b) (Pet. App. A3-A21). However, the district court concluded that the citizens suit provisions of the various federal statutes did not grant respondents the right to intervene under Rule 24(a)(1) (Pet. App. A5-A14). The court also ruled that respondents' interests could be adequately represented by the existing parties (*id.* at A15-A18). Accordingly, the court

denied respondents' motion to intervene as of right pursuant to Rule 24(a)(2) (Pet. App. A18).

In granting permissive intervention under Rule 24(b), the district court imposed several conditions on respondents in this litigation. First, as both the government plaintiffs and petitioners had requested, the district court found that the additional claims that respondents sought to raise would "burden and expand an already complex litigation" (Pet. App. A19). Accordingly, respondents were permitted to litigate only those claims that had been raised by the original parties (*ibid.*). Second, as requested by the petitioners, the district court found that respondents' interest in the cost recovery claims under Section 107 of CERCLA, Section 311 of the CWA, and state law was akin to the interest of a taxpayer (Pet. App. A20). Accordingly, because the court concluded that respondents lacked standing to sue on that basis, the court refused to allow them to intervene as to those claims. Finally, to minimize delay and confusion in discovery, the district court restricted respondents' right to initiate discovery or motions (*ibid.*). The court emphasized that the intervenors would nevertheless be able to participate in discovery and to receive copies of all materials the same as any other party (*ibid.*).

4. Respondents filed a notice of appeal from the district court's order. On May 1, 1984, the court of appeals dismissed the appeal (Pet. App. A23). On June 4, the court issued an opinion explaining the basis for its May 1 order (Pet. App. A22-A25). The court of appeals ruled that the district court's order was not an appealable final order because "[respondent's] interests are protected adequately by their participation as permissive intervenors" (*id.* at A24).

Relying upon *Kartell* v. *Blue Shield of Massachusetts, Inc.*, 687 F.2d 543 (1st Cir. 1982), and *Shore* v. *Parklane Hosiery Co.*, 606 F.2d 354 (2d Cir. 1979), the court also held that the restrictions imposed by the district court upon respondents' participation in the suit did not render the district court's order immediately appealable "absent obvious prejudicial error," which the court did not find (Pet. App. A24-A25). Finally, relying on *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981), the court of appeals rejected respondents' argument that the district court's order was immediately appealable under 28 U.S.C. 1292(a)(1) as a denial of injunctive relief. The court found that respondents had failed to demonstrate that they would suffer any serious, irreparable injury from the district court's order or would be unable to challenge that order at some later point in this suit (Pet. App. A25).

On respondents' petition for rehearing, the court of appeals issued an order withdrawing its June 4 opinion and ruling that the district court's order was immediately appealable (Pet. App. A26-A27). The court explained (*id.* at A26) that a prior Ninth Circuit decision, *California* v. *Block*, 690 F.2d 753 (1982), had ruled that intervention orders like the one at issue in this case were immediately appealable under 28 U.S.C. 1291. The court of appeals denied a suggestion for rehearing en banc filed by one of the petitioners and set an expedited briefing schedule for the appeal (Pet. App. A28-A29).

On March 18, 1985, shortly after oral argument on the merits of respondents' appeal, the court of appeals issued an order reversing the district court's denial of respondents' motion for leave to intervene as of right and vacating the order granting permissive in-

tervention (Pet. App. A1).[7] The order expressed no view as to the appropriateness of the conditions that had been imposed by the district court on respondents' participation as permissive intervenors, and the order did not address the propriety of imposing conditions on respondents' intervention as of right (*id.* at A2). The order stated that "[a]n opinion will follow" (*ibid.*).

Eleven months later, on February 18, 1986, the court of appeals issued its opinion (Pet. Supp. Br. App. A5-A20). On the question of appellate jurisdiction, the court of appeals reiterated its view that it was bound by its prior ruling in *California* v. *Block*, *supra*, that orders denying intervention as of right and granting permissive intervention are immediately appealable (Pet. Supp. Br. App. A10-A11). On the merits, the court of appeals ruled that respondents had to make only a minimal showing that the existing parties—the federal and state plaintiffs and petitioners—would not adequately represent their interests (*id.* at A16). The court found that petitioners had made this showing because of the existence of counterclaims and third party claims against agencies of the plaintiff governments (*id.* at A16-A19).

Meanwhile, on August 1, 1985, petitioners, the owner, generator, or transporter defendants in the underlying action, filed the present petition for a writ of certiorari from the order of the court of appeals reversing and vacating the decision of the district court. On April 2, 1986, petitioners filed a supplemental brief in support of their petition for a writ of certiorari addressing the February 18, 1986, opinion of the court of appeals.

[7] Petitioners filed a petition for a writ of certiorari from the order of the court of appeals reinstating respondents' appeal. No. 84-999 (filed Dec. 20, 1984). However, petitioners later dismissed the petition after the Ninth Circuit entered its March 18, 1985, order.

ARGUMENT

1. The ruling of the court of appeals that the district court's order denying their motion to intervene of right, but granting their motion for permission to intervene, was immediately appealable is plainly wrong, and is in conflict with the decisions of three other courts of appeals and, in principle, with those of this Court. Accordingly, the Court should grant the petition for a writ of certiorari on Question One. The Court may also wish to consider summary reversal.

a. Because an order denying a petition to intervene of right but granting a petition for permission to intervene obviously does not terminate the litigation, the district court's order to that effect is appealable only if it fits within the "collateral order" exception to the final judgment rule articulated by this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). As this Court has emphasized, the collateral order doctrine permits immediate appellate review of a trial court order only when observance of the final judgment rule " 'would practically defeat the right to any review at all.' " *Flanagan* v. *United States*, 465 U.S. 259, 265 (1984) (citation omitted). Accordingly, the collateral order doctrine has been limited to "trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal." *Richardson-Merrell, Inc.* v. *Koller*, No. 84-127 (June 17, 1985), slip op. 6. To qualify as a decision excepted from the final judgment rule by *Cohen*, an order, at a minimum, "must

conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted); accord, *Richardson-Merrell*, slip op. 6; *Flanagan*, 465 U.S. at 265; *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 375 (1981). In applying that standard, the Court has ruled that a trial court order denying a right to be free of trial itself may be immediately appealed.[8] On the other hand, the Court has not permitted an immediate appeal where the right in question can be vindicated by a later reversal of an adverse judgment, or where prejudice is a component of the showing necessary to establish a violation of the right.[9] Taken together, these cases confirm that the collateral order doctrine is " 'narrow exception' " to the finality rule imposed by Congress in 28 U.S.C. 1291, applicable

[8] *E.g.*, *Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985), slip op. 12-18 (qualified immunity from liability in damages); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742-743 (1982) (absolute immunity from suit); *Helstoski* v. *Meanor*, 442 U.S. 500, 506-508 (1979) (absolute immunity from a criminal prosecution under the Speech or Debate Clause); *Abney* v. *United States*, 431 U.S. 651, 659-662 (1977) (immunity from a criminal prosecution under the Double Jeopardy Clause).

[9] *E.g.*, *Richardson-Merrell*, slip op. 16 (disqualification of counsel in a civil case); *Firestone Tire & Rubber Co.* v. *Risjord*, *supra* (refusal to disqualify counsel in a civil case); *Hollywood Motor Car Co.*, 458 U.S. at 267-270 (refusal to dismiss the indictment in a criminal case on the ground of alleged prosecutorial vindictiveness); *United States* v. *MacDonald*, 435 U.S. 850, 860 (1978) (refusal to dismiss the indictment in a criminal case on speedy trial grounds).

only to a " 'small class' of prejudgment orders." *Richardson-Merrell*, slip op. 6.

Leaving aside the question of whether respondents' appeal would qualify under the first two criteria, it is clear that the district court's order does not satisfy the third criterion under *Cohen*, because an order denying a litigant the right to intervene but granting it permission to intervene is fully reviewable upon an appeal from a final judgment. Although this Court has not addressed the precise question presented here, the Court's decision in *Brotherhood of Railroad Trainmen* v. *Baltimore & O.R.R.*, 331 U.S. 519 (1947), provides guidance on this issue. There, the Court explained that a party ordinarily may not appeal from an order denying leave to intervene because, by not being allowed to participate in the case, "the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding." 331 U.S. at 524. By contrast, an applicant is adversely affected by the denial of his intervention motion "where a statute or the practical necessities grant the applicant an absolute right to intervene," because there is "no other way in which he can better assert the particular interest which warrants intervention" (*ibid.*). That order also "has the degree of definitiveness which supports an appeal," because the petitioner "cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene" and becomes a party to the case. *Ibid.* As far as that party is concerned, therefore, "the lawsuit is all over." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 513 (1950). Accordingly, an order denying a petition to intervene of right that wholly excludes a party from

the suit is immediately appealable, because that order is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468 (footnote omitted).

By contrast, litigants, such as respondents, who have been granted permission to intervene are parties to the lawsuit and therefore have the right to appeal from the entry of a final judgment. To this extent, it is immaterial that such litigants have been denied the right to intervene. If a district court does not impose any restrictions on a permissive intervenor's opportunity to participate in the litigation, the question whether that party had the right to intervene effectively becomes moot. On the other hand, if the district court does impose such restrictions, a permissive intervenor may challenge the district court's denial of its petition to intervene of right, as well as the limitations imposed on its participation, following the entry of a final judgment.

In the meantime, the only burden imposed on parties such as respondents from being forced to await the entry of a final judgment is the possibility that all or part of the case on the merits will have to be retried if the district court's decision is reversed. However, this is simply the normal consequence of delaying appellate review of interlocutory trial court orders until the entry of a final judgment. Congress concluded that the overall benefit to the legal system that results from the final judgment rule outweighs the risk that delaying appellate review of the district court's decision on such matters will require a new trial. As this Court has explained, "[i]mplicit in § 1291 is Congress's judgment that the *district judge* has primary responsibility to police the prejudgment tactics of litigants, and that the district judge can

better exercise that responsibility if the appellate courts do not repeatedly intervene to second guess pre-judgment rulings." *Richardson-Merrell*, slip op. 11 (emphasis in original).

b. We agree with petitioners (Pet. 14-18) that the court of appeals' decision in this case conflicts with decisions of the First, Second, and Fifth Circuits. In those cases, the courts held that orders allowing a party to intervene and making the intervenor a party to the case, but limiting the intervenor's opportunity to litigate the case, are not immediately appealable under the collateral order doctrine. See *Kartell* v. *Blue Shield of Massachusetts, Inc.*, 687 F.2d 543, 548-550 (1st Cir. 1982); *Shore* v. *Parklane Hosiery Co.*, 606 F.2d 354, 357 (2d Cir. 1979); *Wheeler* v. *American Home Products Corp.*, 582 F.2d 891, 896-897 (5th Cir. 1977). Those courts reasoned that as long as the intervenor has the right to appeal from an adverse final judgment, effective review can be had, at that time, concerning the trial court's ruling on the party's motion to intervene and the limitations placed on its participation. See, *e.g.*, *Shore*, 606 F.2d at 357; *Kartell*, 687 F.2d at 549-551.

Indeed, in its initial opinion in this case the Ninth Circuit followed the First Circuit's decision in *Kartell* and the Second Circuit's decision in *Shore* and held that the district court's February 17, 1984, order was not immediately appealable (Pet. App. A24). On rehearing, the court simply ruled (*id.* at A26) that it was bound by its earlier decision in *California* v. *Block*, 690 F.2d 753 (9th Cir. 1982).[10] However,

[10] In *Block*, the district court denied a party's petition to intervene of right, but granted that party permissive intervention. 690 F.2d at 760. The applicant challenged the district court's refusal to permit intervention of right on appeal from the entry of a final judgment. The court of appeals held

that decision simply stated (690 F.2d at 776) that the denial of a petition to intervene of right is immediately appealable and did not explain why an order of that type was appealable where the applicant was granted leave to intervene. The final opinion of the court of appeals in this case simply reiterated its earlier conclusion that *California* v. *Block*, *supra*, was controlling (Pet. Supp. Br. App. A10-A11).[11] Thus, the court of appeals has failed to offer any reason why *a party* to a lawsuit may im-

that the applicant's appeal was untimely, on the ground that an order denying intervention of right is immediately appealable. *Id.* at 776. In so ruling, the court did not consider the hybrid nature of the district court's order, as evidenced by the decision upon which the court in *Block* relied, which involved a denial of a petition to intervene of right that wholly excluded the petitioner from participating in the case. See 690 F.2d at 776, citing *County of Fresno* v. *Andrus*, 622 F.2d 436, 438 (9th Cir. 1980).

[11] The court of appeals noted that the respondents had demonstrated that the conditions placed on their intervention by the district court were burdensome (Pet. Supp. Br. App. A11 n.3). But the court of appeals did not address the conditions placed on the grant of intervention in its opinion. Moreover, the restrictions or conditions placed on respondents' participation can be challenged in an appeal from a final judgment. Respondents are thus in the same position as a party who has had one or more claims dismissed or who has been limited in the scope of discovery that it may undertake. Orders of that type may not be immediately appealed. See Fed. R. Civ. P. 54(b); 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3914, at 542, 567-568 (1976 & Supp. 1985). If the validity of the conditions placed upon intervention are both crucial to the future conduct of the case and questionable as a matter of law, 28 U.S.C. (Supp. II) 1292(b) provides an appropriate avenue for seeking immediate appellate review of such interlocutory orders. See *Cooper & Lybrand*, 437 U.S. at 474.

mediately appeal an order denying that party's petition to intervene of right. Because the Ninth Circuit's erroneous ruling conflicts with the decisions of other courts of appeals and is inconsistent with the principles that the Court has applied to similar questions of appellate jurisdiction, review by this Court is warranted.

2. Question Two of the petition is concerned with the merits of the court of appeals' determination that the district court erred in denying respondents leave to intervene as of right pursuant to Fed. R. Civ. P. 24(a). Petitioners claim (Pet. Supp. Br. 5-8) that the court of appeals' standard for establishing inadequate representation by existing parties—a minimal showing—is erroneous and inconsistent with the standard employed by the Second Circuit in a similar case, *United States* v. *Hooker Chemicals & Plastics Corp.*, 749 F.2d 968 (1984), and with decisions of other courts of appeals on the question whether private parties must demonstrate more than a slight possibility that they will be inadequately represented by a governmental litigant before such parties have the right to intervene under Rule 24(a)(2). See, *e.g.*, *New Orleans Public Service, Inc.* v. *United Gas Pipe Line Co.*, 690 F.2d 1203, 1213 & n.7 (5th Cir. 1982); *Environmental Defense Fund, Inc.* v. *Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979); *Pennsylvania* v. *Rizzo*, 530 F.2d 501 (3d Cir.), cert. denied, 426 U.S. 921 (1976).[12] Of course, the government has

[12] The court of appeals reasoned that the government plaintiffs were not adequate representatives because they were the subject of counterclaims filed by the generator defendants and because they opposed certain claims that respondents sought to raise. Pet. Supp. Br. App. A17-A19 & n.6. For the reasons given in the text, however, we do not believe that this case provides a suitable vehicle to resolve this matter.

a substantial interest in the maintenance of reasonable rules governing the entry of private individuals into litigation that is initiated by the government and that involves public rights. Thus, in an appropriate case in the future, we may urge the Court to examine the Ninth Circuit's doctrine concerning intervention of right under Fed. R. Civ. P. 24(a)(2) in such cases.

However, it would be inappropriate to consider that question in this case because, as we have shown, the court of appeals lacked jurisdiction to decide it in the interlocutory posture of this case. Even apart from that dispositive consideration, we would not urge the Court to grant the petition as to Question Two because the factual posture of this case does not provide a suitable vehicle for review of this question. When respondents sought to intervene in the district court, both the petitioners and the governmental plaintiffs agreed that respondents should be permitted to intervene as parties to the litigation (see page 5, *supra*), and there has never been any dispute in this case over that question. Rather, it has been our position throughout this litigation that the essence of the dispute between respondents and the other parties is whether the district court can impose conditions on respondents' intervention, such as limiting their opportunity to raise additional claims, to participate in the cost recovery aspects of the litigation, and to initiate discovery or motions. See pages 5-6, *supra*.[13] The court of appeals did not

[13] Although the district court denied respondents' motion to intervene in the cost recovery aspect of this suit on the ground that respondents lacked standing as to this subject, the district court's ruling was vacated by the court of appeals. Accordingly, this case does not present the issue mooted in *Diamond*

decide whether the conditions that were imposed by the district court were valid; the court of appeals simply held that respondents were entitled to intervene. It is unclear at this time whether that ruling will have any practical significance in this case because the court of appeals explicitly left open the question whether the district court on remand may impose the same or similar limitations on respondents' participation as intervenors of right (Pet. App. A2). Accordingly, the court of appeals' ruling that respondents are entitled to intervene in this suit does not presently appear to be of any substantial practical importance in this case.

Review of this question by this Court is also unnecessary at this time because the questions whether private parties like respondents should be allowed to intervene in hazardous waste abatement and cost recovery suits and, if so, whether their participation may be limited are presently before Congress in the legislation providing for reauthorization of and amendments to CERCLA. See *Exxon Corp.* v. *Hunt*, No. 84-978 (Mar. 10, 1985), slip op. 5 n.6. The Senate passed the Superfund Improvement Act on September 26, 1985. 131 Cong. Rec. S12184 (daily ed. Sept. 26, 1985). Section 150 of that bill would add a provision to CERCLA that would provide for conditional intervention of right in government initiated CERCLA and RCRA actions. The House passed the Superfund Amendments of 1985 on December 10, 1985. 131 Cong. Rec. H11619 (daily ed. Dec. 10, 1985). Section 113(i) of the House Bill would provide for intervention of right in CERCLA

v. *Charles*, No. 84-1379 (Apr. 30, 1986), slip op. 13-14, whether a party seeking to intervene in district court must satisfy Article III requirements as well as those of Rule 24.

actions. The bills, both renumbered H.R. 2005, 99th Cong., 1st Sess. (1985), are presently before a conference committee. To be sure, the prospect and timing of a final enactment of the CERCLA Amendments is presently uncertain, and there is also no assurance that Congress will include a provision authorizing statutory intervention in the final enactment. Nonetheless, for the present, the question whether parties like respondents ought to be permitted to intervene of right in hazardous waste abatement suits is currently before Congress, and final enactment of an intervention provision would make review of this question by this Court unnecessary.[14]

For all of these reasons, review of Question Two by this Court would be inappropriate at this time.

CONCLUSION

The petition for a writ of certiorari should be granted limited to Question One. The Court may wish to consider summary reversal on that question. In all other respects, the petition should be denied.

Respectfully submitted.

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MAY 1986

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[14] We will of course inform the Court of any further legislative developments that may affect this case.

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OPPOSITION

BRIEF

Supreme Court, U.S.
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No. 85-184

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

J.B. STRINGFELLOW, JR., et al.

Petitioners,

vs.

CONCERNED NEIGHBORS IN ACTION, et al.,

Respondents.

On Petition for a Writ of
Certiorari to the United States
Court of Appeals for the
Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 85-184

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

J.B. STRINGFELLOW, JR., et al.

Petitioners,

vs.

CONCERNED NEIGHBORS IN ACTION, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Concerned Neighbors in Action and Penny Newman ("respondents") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 18, 1986.

QUESTIONS PRESENTED

1. Does the simultaneous grant of limited permissive intervention deprive an applicant of the right to an immediate appeal of a final order denying intervention as of right?

2. Did the Court of Appeals err in concluding that respondents have met the requirements for intervention as of right under Fed. R. Civ. P. 24(a)?

OPINIONS BELOW

The Court of Appeals denied petitioners' motion to dismiss the appeal on September 6, 1984 (reported unofficially at 20 Env't Rep. (BNA) 2233 (9th Cir. 1984)). On March 18, 1985, the Court of Appeals entered its judgment on the merits in this action with an opinion to follow, reversing the District Court's denial of respondents' right to intervene under Fed. R. Civ. P. 24(a). 755 F.2d

1383 (9th Cir. 1985). On February 18, 1986, the Court of Appeals issued its full opinion, holding (1) that the denial of intervention as of right is a final appealable order and (2) that respondents have met the requirements for intervention as of right under Fed. R. Civ. P. 24(a)(2). 783 F.2d 821 (9th Cir. 1986). The opinion of the District Court denying respondents' right to intervene but granting limited permissive intervention was issued on February 17, 1984 (reported unofficially at 20 Env't Rep. (BNA) 1659 (C.D. Cal. 1984)).

All four opinions are reproduced in the Appendices to the July 30, 1985 Petition for a Writ of Certiorari ("Pet. App.") and the March 28, 1986 Supplemental Brief in Support of the Petition ("Pet. Supp. App.").

STATUTES INVOLVED

The relevant statutes are set forth as an Appendix to the Petition, at A-30 to A-45. However, the correct version of the Resource Conservation and Recovery Act ("RCRA"), § 7002, 42 U.S.C. § 6972, as amended, is reproduced in the Appendix hereto, at A-1 to A-3. Also included in the Appendix, at A-4, is the Superfund Improvement Act, S.51, § 150(c).

STATEMENT OF THE CASE

This petition arises out of an action filed on April 21, 1983 by the United States and the State of California ("plaintiffs") seeking clean-up of the Stringfellow Acid Pits, the largest hazardous waste dumpsite in the United States, and reimbursement for any government funds expended in abating the hazards. Thirty-one waste generator,

transporter, and owner-operator individuals and companies were named in the action as defendants.

On July 15, 1983, respondents Concerned Neighbors in Action and Penny Newman[1/] filed a motion seeking leave to intervene as of right on behalf of the residents and property owners in the communities surrounding the dumpsite. Pursuant to Rule 24(a) of the Federal

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1/ Concerned Neighbors in Action ("CNA") is a nonprofit corporation established under the laws of California. It comprises and represents over 400 members who are residents, taxpayers, and property owners in the communities surrounding the Stringfellow Acid Pits that are served by the Chino III groundwater basin in Riverside County, California. CNA's primary purposes and interests include ensuring the full clean-up of the Acid Pits, monitoring the performance of government agencies responsible for the clean-up, and informing the public of such matters. More broadly, CNA has encouraged and assisted in the development of sensible public policies regarding the handling of toxic wastes. Penny Newman is chairperson and co-founder of CNA and a 17-year resident of Glen Avon.

Rules of Civil Procedure ("Fed. R. Civ. P. 24") and various federal environmental statutes, respondents based their application on the fact that they are the persons most directly endangered by the imminent hazard caused by releases of toxic wastes from the Acid Pits. Because of their constant and unavoidable proximity to the site and their reliance upon the area's endangered groundwater supply for personal and agricultural uses, respondents alleged that they have an undeniable interest in the outcome of the proceeding, an interest which has not been -- indeed, could not be -- adequately represented by the existing parties to the action, all of whom caused or contributed to the creation of the hazard. Respondents asserted that because the disposition of this action will inevitably determine the course for clean-up of the Acid Pits, the extent of

the abatement of the associated hazards, and the allocation of liability for the consequences of those hazards, their interests would as a practical and legal matter be impaired without their full participation in this action.[2/]

On February 17, 1984, the District Court denied respondents' motion for

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[2/] In support of their application, respondents lodged their proposed Complaint in Intervention, asserting claims not only against the 31 defendant generators, transporters, and owners of the dumpsite ("defendants"), but also against the appropriate agencies of the plaintiff governments, who were largely responsible for the creation and maintenance of the hazard and who for years have ignored their duty to clean up the Stringfellow site. Respondents also filed supporting declarations describing in detail their longstanding interest in the subject matter of the litigation and the basis for their contention that, due to a number of substantial and well-documented conflicts of interest between the existing parties and respondents, neither the plaintiffs nor defendants could adequately represent respondents' interests in this action.

leave to intervene as of right.[3] Although conceding that respondents have an important "protectable" interest in the subject matter of the litigation and acknowledging the serious "conflicts of interest" between respondents and the existing parties, the District Court concluded nonetheless that respondents were not entitled to intervention as of right, reasoning that they could be adequately represented on some of their claims by plaintiffs and on others by defendants. The District Court then nominally granted respondents leave to

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[3] Order Granting Leave to Intervene (Pet. App. A-3). Although denominated by the District Court as an order granting intervention, that title refers only to its grant of limited permissive intervention pursuant to Fed. R. Civ. P. 24(b). See discussion infra at II.A. There is no dispute that the District Court denied respondents' application for leave to intervene as of right, and it is that denial which the Ninth Circuit reversed in its February 18, 1986 decision that is the focus of the Petition.

intervene permissively under Fed. R. Civ. P. 24(b), but placed such restrictive conditions on their participation that they were in essence relegated to the status of amici curiae.[4/]

Following respondents' timely filing of a notice of appeal, plaintiffs and defendants moved to dismiss, which motions were initially granted by the Court of Appeals. On September 6, 1984, however, the Court granted respondents' petition for rehearing, vacated its previous dismissal, and reinstated the

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4/ The court imposed the following limitations on respondents' participation in the action: (1) they may assert no claims or requests for relief that have not been asserted by the existing parties; (2) they may not participate in cost recovery claims; and (3) they may not initiate any motions or discovery without first (a) meeting and conferring with all other parties to the action, and (b) obtaining the concurrence of at least one existing party to the initiation of such motion or discovery. None of the 33 other parties is subject to these limitations.

appeal. Relying on its prior decision in State of California v. Block, 690 F.2d 753 (9th Cir. 1982), the Court held that "[d]enial of intervention as of right is a final appealable order, despite the grant of permissive intervention." Opinion, at 1 (Pet. App. A-26). Defendant and petitioner herein Montrose Chemical Corporation then applied for reconsideration by the panel and by the Court en banc, which application was denied in an order dated October 26, 1984. (Pet. App. A-28.)

Following briefing and hearing of the appeal on the merits, the Court of Appeals issued an order on March 18, 1985 reversing the District Court's denial of intervention as of right and vacating the grant of permissive intervention. (Pet. App. A-1.) On February 18, 1986, the Court of Appeals issued a full opinion setting forth the reasons for its prior

order and holding specifically (1) that the denial of intervention as of right is a final appealable order; and (2) that petitioners have met the requirements for intervention as of right under Fed. R. Civ. P. 24(a)(2). (Pet. Supp. App. A-1.)

REASONS FOR DENYING THE WRIT

This Court should deny the petition for writ of certiorari. First, petitioners have neglected to mention that recent congressional action has effectively mooted the issues raised in the petition. During the pendency of respondents' appeal from the District Court's denial of their right to intervene in this action, Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616. As is discussed below, these amendments expressly grant local residents like

respondents a statutory right to intervene in "imminent hazard" actions under the Resource Conservation and Recovery Act ("RCRA"), and the legislative history surrounding the passage of the amendments reveals that Congress had always intended to provide for such citizen intervention as a valuable supplement to government actions to enforce the nation's environmental laws. The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund") reauthorization bills currently awaiting passage by both houses of Congress likewise evidence this unmistakable intent to provide a statutory right of intervention in cases like this one. Thus, these recent legislative enactments not only furnish an alternative ground under Fed. R. Civ. P. 24(a)(1) to support the Court of Appeals' ruling, but confirm the soundness and conformity to

congressional intent of that court's decision under Fed. R. Civ. P. 24(a)(2).

Second, the alleged conflicts cited by petitioners as the justification for this Court's exercise of its certiorari discretion do not in fact exist. To the contrary, the Ninth Circuit's decision below is fully consistent with both the decisions of this Court and other circuit courts of appeals. On the appealability question, for example, the Court of Appeals followed the settled principle that a denial of intervention as of right is a final order subject to immediate appeal pursuant to 28 U.S.C. § 1291; none of the allegedly conflicting cases relied upon by petitioners involved an appeal, as here, from the unequivocal denial of an applicant's right to intervene, nor do those cases address factual circumstances even remotely akin to those in the instant case, where the imminent hazard

to respondents renders an immediate appeal essential. As to the merits, petitioners' attempt to manufacture conflicts on the subsidiary issues of the appropriate standard of review and burden of demonstrating inadequacy of representation is similarly unavailing. Again, these purported conflicts are more apparent than real, and the Ninth Circuit's decision is supported by established principles of law uniformly applied throughout the judicial circuits.

Finally, plenary consideration by this Court is unwarranted given the manifest correctness of the Court of Appeals' ruling and the unique facts of this case. Indeed, while petitioners seek to take issue with various minor components of the decision below, they eschew virtually any attempt to challenge the court's ultimate determination that the adversity of interests between respondents and each

of the original parties gives rise to the right to intervene under Rule 24(a)(2). It is the presence of this unique factual circumstance that most clearly distinguishes the case at bar from other hazardous waste clean-up cases, and -- as the Court of Appeals itself acknowledged (Pet. Supp. App. A-19 n.6) -- it is this same factor that undeniably establishes respondents' right to intervene regardless of the precise standard of review applied by the Court of Appeals.

I. RECENT LEGISLATIVE ENACTMENTS HAVE EFFECTIVELY MOOTED THE ISSUES RAISED IN THE PETITION.

While respondents' appeal from the District Court's motion to intervene as of right was pending before the Court of Appeals, Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616. Among other changes, that law made two important alterations in the

citizen-suit provision of RCRA, § 7002, 42 U.S.C. § 6972:[5] First, it added a new subsection (B) to § 7002(a)(1) in order to authorize private citizens to bring an "imminent hazard" action; second, it granted local residents the right to intervene in any "imminent hazard" action initiated by federal or state authorities unless the government could show that the applicants' interests were adequately represented by the existing parties. 42 U.S.C. § 6972(b)(2)(E).[6]

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[5] Inexplicably, the version of this provision set forth in the Petition (Pet. App. A-39 to A-41) does not incorporate the 1984 RCRA amendments, even though they had been enacted some nine months before the Petition was filed. For the Court's convenience, the correct amended version of § 7002 is set forth in the Appendix hereto, at A-1 to A-3.

[6] Although the legislative history of the 1984 RCRA Amendments leaves no doubt that the intervention provision was intended to apply particularly to imminent hazard actions brought by the E.P.A. (see note 7 infra), an unintentional

[Continued]

The 1984 RCRA Amendments and pending CERCLA reauthorization bills are significant in at least two respects. First,

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6/ [Cont'd]
drafting error injected some ambiguity into the final statutory language so that subsection 7002(b)(2)(E) expressly authorizes intervention only in state- or citizen-initiated actions but omits any reference to E.P.A.-initiated actions. As the Court of Appeals acknowledged, however, there is "considerable merit" (Pet. Supp. App. A-19 n.7) to a construction of § 7002(b)(2)(E) that fulfills the evident congressional intent of authorizing citizen intervention in all imminent hazard actions.

In any event, both houses of Congress have now enacted bills to clarify once and for all that local residents are entitled to intervene in environmental enforcement actions like the case at bar. The Senate version of the CERCLA reauthorization, S.51, contains a provision that will correct and clarify the technical error in the 1984 RCRA Amendments by adding a new section to CERCLA that grants citizens the right to intervene "[i]n any action commenced by the President or a State, under this Act or under the Solid Waste Disposal Act [i.e., RCRA]." See Superfund Improvement Act, S.51, § 150(c), reprinted in 131 Cong. Rec. S12184, S12198-99 (daily ed. Sept. 26, 1985). (The full text of this provision is reproduced in the Appendix
[Continued]

they provide an alternative and independent ground to support the Court of Appeals' ruling, thus making it unnecessary for this Court even to reach the issues raised in the petition for certiorari. Because the Court of Appeals found that respondents were entitled to intervene as of right under the general standards of Rule 24(a)(2), it had no occasion to rule on the statutory right of intervention question pursuant to Rule 24(a)(1). Nevertheless, the court noted

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6/ [Cont'd]
hereto, at A-4.) The House version of the Superfund reauthorization, the Superfund Amendments of 1985, likewise includes a new section authorizing citizen intervention in any enforcement action brought by the government under CERCLA. See H.R. 2817 (renumbered H.R. 2005), § 113(i), reprinted in 131 Cong. Rec. H11619, H11627-28 (daily ed. Dec. 10, 1985). Although final passage of the CERCLA reauthorization has been delayed pending reconciliation of some differences in the Senate and House bills, both houses are in agreement on the intervention question.

"the persuasiveness" of respondents' claim in this regard and agreed that their position "appears to have considerable merit." (Pet. Supp. App. A-19 & n.7.) This is certainly the only conclusion that would be consistent with the legislative history of the 1984 Amendments, which reveals an unmistakable congressional intent to afford local residents a statutory right of intervention in government-initiated . . enforcement actions.[7/] Thus, the 1984

7/ See, e.g., S. Rep. No. 98-284, 98th Cong., 1st Sess. 56 (1983):

> These amendments provide any person with a statutory right to intervene as a party to section 7003 suits filed by the Administrator, or new section 7002(a)(1)(B) suits filed by a State, "unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties." . . . . The purpose of the amendments is to make it easier for individuals who may be

[Continued]

RCRA Amendments have effectively mooted the questions presented in the petition, making this a wholly inappropriate case

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7/ [Cont'd]

> assuming an imminent and substantial risk as a result of the defendant's activities to participate in these suits, particularly in fashioning the appropriate remedy for eliminating the risk.

As the intervention amendment's sponsor, Sen. Mitchell, explained:

> The citizen suit amendments to S.757 also clarify the intent of the current law that citizens do have a statutory right to intervene in imminent hazard cases brought by EPA. This right of intervention has been an important mechanism for insuring citizen involvement in litigation and proposed settlements between EPA and defendant companies.

130 Cong. Rec. S9152 (daily ed. July 25, 1984).

for this Court's review.[8/]

In addition, these recent congressional actions provide further confirmation that the Court of Appeals properly determined that respondents were entitled to intervene as of right under Rule 24(a)(2). Petitioners' principal

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[8/] The jurisdictional question raised by petitioners has also been mooted by these recent Congressional enactments, for even if the District Court's order were deemed to be "non-final" and hence not appealable (as petitioners contend), respondents could request that the District Court reconsider its intervention ruling based upon the intervening change in the law. That court, of course, would have the unquestioned authority to reconsider and to revise its previous ruling, either under Fed. R. Civ. P. 60(b) or the inherent power of the district courts. See, e.g., Hodgson v. United Mine Workers of America, 473 F.2d 118, 125-26 & n.38 (D.C. Cir. 1972) ("the law recognizes the power and responsibility of the court to reconsider its ruling [on intervention] if a material change in circumstance has in fact occurred"); Greene v. Union Mutual Life Ins. Co., 764 F.2d 19, 22 (1st Cir. 1985); Campos v. Puerto Rico Sun Oil Co., 536 F.2d 970, 972 n.6 (1st Cir. 1976); Johnson v. Township of Bensalem, 609 F.Supp. 1340, 1342 (E.D. Pa. 1985).

challenge to the decision below rests on their assertion that the court should have required respondents to make "a strong affirmative showing that the sovereign is not fairly representing [their] interests." Pet. 22; see also Pet. Supp. 7-8.[9/] But Congress has now made crystal clear its intention that such a stringent burden is inappropriate for hazardous-waste cleanup actions like the present case. If anything, in fact, the court below held respondents to too high a standard of demonstrating the inadequacy of representation, for the recent legislative enactments would require the government to show affirmatively that the applicant's interests were adequately

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9/ Indeed, petitioners concede that respondents satisfy the "impairment of interest" requirement of Rule 24(a)(2). See Pet. 21-22.

represented by the existing parties. See 42 U.S.C. § 6972(b)(2)(E); S.51, § 150(c), reprinted in 131 Cong. Rec. S12199 (daily ed. Sept. 26, 1985).[10/] As the Senate Report accompanying the 1984 RCRA Amendments explained, "By requiring the government to demonstrate that the applicant's interests are already represented, this amendment reverses the normal presumption of Rule 24 of the Federal Rules of Civil Procedure." Thus, by its recent actions, Congress has confirmed that petitioners' objection to the Court of Appeals' decision under Rule 24(a)(2) is wholly without merit. Accordingly, the petition for writ of certiorari should be denied.

10/ The House version of the Superfund reauthorization would even go so far as to remove the "inadequacy of representation" requirement altogether for citizen intervention in CERCLA clean-up actions. See H.R. 2817, § 113(i), reprinted in 131 Cong. Rec. H11628 (daily ed. Dec. 10, 1985).

II. THE DECISION BELOW IS FULLY CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER CIRCUIT COURTS OF APPEALS.

Although petitioners seek to persuade this Court that granting certiorari is necessary in order to resolve certain alleged "conflicts" created by the decision below, this is simply not the case. To the contrary, when the purportedly conflicting decisions of this Court and the other circuit courts of appeals are properly analyzed and compared to the decision below, it is apparent that the Court of Appeals simply applied long-settled principles of law in its holdings both on the jurisdictional question and on the merits.

A. Appealability of the District Court's Order Denying Respondents' Right to Intervene

There is no dispute that respondents applied for, and were unequivocally

denied, intervention in this action as a matter of right.[11] When respondents appealed that denial, petitioners moved to dismiss the appeal as interlocutory. The Court of Appeals denied petitioners' motion, citing its prior decision in State of California v. Block, 690 F.2d 753 (9th Cir. 1982), and relying upon the fundamental principle long established by this and other courts that the "[d]enial of intervention as of right is a final appealable order . . . ." Pet. App. A-1; see also Pet. Supp. App. A-10, A-11).[12]

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[11] In its 19-page opinion, the District Court reiterated at least five separate times its holding that respondents are not entitled to intervene as of right, either pursuant to the environmental statutes underlying the action or pursuant to Fed. R. Civ. P. 24(a). See Pet. App. A-4, A-14, A-15, A-16, A-18.

[12] See, e.g., Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 524-25 (1947) [Continued]

Unable to dispute the validity of this underlying principle, petitioners nonetheless seek review by this Court, alleging a conflict with the decisions of this and other courts and contending that the unequivocal entitlement to an

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12/ [Cont'd]
("[W]here a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying intervention becomes appealable"); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983) ("Denial of a motion to intervene as of right under Rule 24(a)(2) is appealable as a final order within the meaning of 28 U.S.C. § 1291"); Blake v. Pallan, 554 F.2d 947, 951 n.5 (9th Cir. 1977) ("The majority rule, followed by this Circuit, is that where a party is entitled to intervene as a matter of right, an order denying intervention is appealable"); McClune v. Shamah, 593 F.2d 482, 485 (3d Cir. 1979) ("When an absolute right to intervene in a lawsuit is claimed, and the claim is rejected, the order denying intervention is considered final and appealable"); Corby Recreation, Inc. v. General Electric Co., 581 F.2d 175 (8th Cir. 1978) (same); Ionian Shipping Co. v. British Law Ins. Co., 426 F.2d 186, 188-89 (2d Cir. 1970) (same); Nuesse v. Camp, 128 U.S. App. D.C. 172, 385 F.2d 694, 699 n.2 (D.C. Cir. 1967) (same).

immediate appeal is inapplicable where the denial of intervention as of right is accompanied by a discretionary grant of limited permissive intervention. As appears below, however, no conflict exists, and petitioners, in seeking to create one, not only contravene the consistent line of authority cited above, but they ignore the distinction specifically drawn by Congress in differentiating between intervention as of right under Fed. R. Civ. Proc. 24(a) and by permission under Rule 24(b).

None of the cases cited by petitioners supports their assertion of a conflict with the decisions of this Court. Indeed, in the case principally relied on by petitioners -- Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519 (1947) -- this Court explicitly recognized that the nature of the applicant's right to

intervene is the critical factor in determining whether a denial of intervention is a final order and hence can be appealed:

> Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack the power to review it. In other words, our jurisdiction is identified by the necessary incidents of the right to intervene in each particular instance.

331 U.S. at 524-25.

Contrary to petitioners' assertion of a conflict, therefore, the very distinction between intervention as of right and by permission recognized by this Court in Brotherhood of Railroad Trainmen underlies the Court of Appeals' jurisdictional decision below. In contrast to

permissive intervention under Rule 24(b), intervention as of right is not a matter committed to the court's discretion; by its very terms, it is a right to which the applicant is entitled upon a showing of sufficient interest, potential impairment of that interest, and lack of an adequate representative among the existing parties. Because a denial of that right is a final adjudication of the applicant's statutory right to participate as a party and thereby to protect fully his or her interest in the action, the courts have consistently deemed it a final order within the meaning of 28 U.S.C. § 1291.[13/] Far from establishing

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13/ See note 12 supra. Such an interpretation is consistent not only with Brotherhood of Railroad Trainmen but with the repeated admonitions of this Court and others that the requirement of finality under 28 U.S.C. § 1291 be given "a practical rather than a technical construction." Gillespie v. United States Steel Corp., 379 U.S. 148, 152 [Continued]

a conflict and the need for further review by this Court, Brotherhood of Railroad Trainmen thus provides additional support for the Ninth Circuit's action in this case.

13/ [Cont'd]
(1964); Van Hoomissen v. Xerox Corporation, 497 F.2d 180, 182 (9th Cir. 1974); Spangler v. United States, 415 F.2d 1245, 1247 (9th Cir. 1969).

By contrast, if, as petitioners urge here, a concurrent grant of permissive intervention can negate the right to a prompt and timely appeal from such orders, the right to intervene would itself effectively be nullified. As the present case demonstrates, a court could improperly deny intervention as of right, yet prevent an appeal of that decision simply by nominally granting permissive intervention subject to any number of potentially disabling restrictions. The result is the worst of all worlds for the intervention applicant: Not only would that party wrongfully be denied both the right to intervene and the right that it concededly would otherwise have had to a timely appeal of that denial, but in the meantime it would be legally bound to any judgment subsequently entered in the case without having had the opportunity to protect its interest effectively due to the conditions imposed on its participation. Such a result can be reconciled neither with the letter and spirit of Rule 24 nor with the ends of justice.

Petitioners' citation of Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), and Richardson-Merrell, Inc. v. Koller, __ U.S. __, 105 S.Ct. 2757 (1985), is simply inapposite. Those decisions involved only the applicability of the narrow "collateral order" doctrine to various concededly non-final orders under 28 U.S.C. § 1291. By contrast, this case -- like Brotherhood of Railroad Trainmen -- involves the appeal of an order unequivocally denying intervention as of right, which has long been held to be a final appealable order under § 1291. Thus, the "collateral order" doctrine and the decisions cited by petitioners applying it are simply beside the point

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and in no way conflict with the Court of Appeals' decision below.[14/]

[14/] Even if the District Court's denial of intervention as of right were deemed to be non-final, however, this case would nonetheless fall within the "collateral order" exception as defined by the three-part test discussed in Coopers & Lybrand and Richardson-Merrell. First, the order "conclusively determine[d] the disputed question" of respondents' right to intervene; second, it "resolve[d] an important issue completely separate from the merits of the action"; and third, given the urgent need for expedited action to remedy the public health hazard that has given rise to this action and to respondents' application to intervene, it is "effectively unreviewable on appeal from a final judgment." Coopers & Lybrand, 437 U.S. at 468. The imminence of the hazard to respondents at Stringfellow resulting from the years of delay in undertaking clean-up measures. renders essential the right to an immediate appeal in this case if respondents' right to intervene is to have any practical value. A plume of toxic chemicals from the site is steadily approaching the groundwater supplies essential to the very survival of the surrounding communities, if, indeed, those supplies have not already been dangerously contaminated. Consequently, expedited clean-up measures are urgently needed now. As a scientific matter, and from a practical standpoint, the clean-up remedy established by the resolution of this action

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Nor does the Court of Appeals' order permitting an immediate appeal conflict with decisions rendered by other courts of appeals. Although petitioners assert that "three other circuits . . . all held that orders granting permissive intervention but denying intervention as of right are not immediately appealable" (Pet. 14), each of those decisions differs materially from this case in precisely the respect that petitioners seek to ignore -- namely, that the District Court here plainly and unequivocally denied appellants' motion to

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14/ [Cont'd]
(whether through trial or settlement) will essentially be the clean-up program implemented for the Stringfellow site, and it will preclude the adoption of any other remedial options that respondents may subsequently be able to prove are required. At that point, the right to appeal the denial of intervention would be of little more than academic interest, for the outcome of this action would for all practical purposes have been conclusively and irrevocably determined.

intervene as of right. In Shore v. Parklane Hosiery Co., Inc., 606 F.2d 354 (2d Cir. 1979), for example, the Second Circuit dismissed an appeal where the trial court had granted intervention as of right to certain shareholders opposed to a proposed settlement agreement, but had limited that grant to participation in the ongoing settlement proceedings. The court of appeals simply determined that the district court's order was a grant of intervention as of right under Rule 24(a) (see id. at 356-57) and, consequently, that the intervening shareholders' appeal of the limitations imposed would have to await the appeal, if any, from a final order. Similarly, in Kartell v. Blue Shield of Massachusetts, Inc., 687 F.2d 543 (1st Cir. 1982), the First Circuit, relying on Parklane Hosiery, dismissed an appeal from the district court's grant of

intervention as of right with a limitation on intervenors' right to assert certain additional claims. The court noted in particular that the intervention application, filed by former plaintiffs, was in essence only a ruse to file an amended complaint, which traditionally is held to be a nonappealable matter solely within the discretion of the trial court.15/

15/ Wheeler v. American Home Products Corp., 582 F.2d 891 (5th Cir. 1977), also cited by petitioners, is not to the contrary. There, following final judgment in the district court, the court of appeals rejected the appellees' attempt to preclude any appellate review of the district court's intervention order, concluding that the earlier order granting limited intervention need not have been immediately appealed but could properly await the end of the case. In addition to the unique factual context presented in Wheeler, the decision is inapplicable here because it is unclear whether the appellants there even sought intervention as of right and, if so, whether that application was denied or merely granted with limitations. At a minimum, however, the court's opinion

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Thus, none of the decisions relied upon by petitioners involves an appeal of the unequivocal denial of an applicant's right to intervene, nor do these cases address factual circumstances even remotely akin to the urgency of those in the instant case.[16] Consequently, the

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[15] [Cont'd]
implies that the result might have been different, and the intervention order immediately appealable, had the order imposed any substantive restriction on the claims that the intervenors could assert. See id. at 896.

[16] Petitioners' suggestion that the Court of Appeals' denial of their motion to dismiss the appeal could lead to "an increase in the difficulty and ultimate expense of cleaning-up waste disposal sites" (Pet. 24-25), is simply untenable. More than any other party to this action, respondents have an interest in the prompt resolution of this action and the full clean-up of the Stringfellow Acid Pits, an interest demonstrated through years of frustrated attempts to compel the responsible parties -- including petitioners -- to abate the releases of toxic chemicals from the dumpsite. In stark contrast, far from demonstrating an interest in expediting this litigation or the clean-up of the dumpsite,
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Court of Appeals' conclusion in this case that such a denial is immediately appealable conflicts with neither the decisions of this Court nor the decisions of the courts of appeals for the other judicial circuits. Indeed, to the contrary, its conclusion is fully consistent with the well-established principle that the denial of intervention as of right is a final order within the meaning of 28 U.S.C. § 1291 and hence

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16/ [Cont'd]
petitioners have from the outset of this action opposed respondents' right to intervene, opposed respondents' right to appeal the denial of that right, opposed respondents' motion to expedite the appeal, and, when a panel of the Ninth Circuit ultimately denied petitioners' motion to dismiss the appeal, requested reconsideration by the full Court of Appeals and, now, have petitioned for a writ of certiorari in this Court. Thus, any delay or burden associated with this appeal is a product not of respondents' attempt to vindicate their right to intervene, but of petitioners' unceasing efforts to thwart that right.

subject to immediate appeal. Accordingly, the petition for a writ of certiorari should be denied.

B. Respondents' Right to Intervene Under Fed. R. Civ. P. 24(a)(2).

On the merits, petitioners contend that the decision below "is directly contrary to a recent Second Circuit case with facts virtually identical to the facts of the case at bar." (Pet. 19.) This is simply not an accurate characterization of that Second Circuit case, United States v. Hooker Chemicals & Plastics Corp., 749 F.2d 968 (2d Cir. 1984).

The facts in Hooker are by no means "virtually identical to the facts of the case at bar." Most fundamentally, as the Court of Appeals below recognized, "this case is . . . clearly distinguishable from Hooker" (Pet. Supp. App. A-19 n.6)

in that respondents' interests are adverse to those of the plaintiff governments in this case, whereas no element of adversity existed in Hooker. Unlike this case, there was not even a suggestion in Hooker that the state and federal plaintiffs bore any liability for the hazardous conditions at the subject dumpsite, and the environmental groups that had applied for intervention possessed no interests that were even dissimilar, much less adverse, to those of the governmental plaintiffs. In fact, the applicants for intervention in Hooker apparently did not even assert any specific, private interest in the subject of the action, but merely alleged that their interests were more "focused" than those of the original parties. Thus, the Hooker court found that the environmental groups had not presented any evidence demonstrating that the governmental

plaintiffs would not (and did not) adequately represent their general interests. The same cannot be said in the instant action.17/

The important factual distinctions between this case and Hooker not only account for the differing conclusions

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17/ In addition, it is significant that the Second Circuit's decision in Hooker was handed down prior to the passage of the 1984 RCRA Amendments. Hooker's analysis of the "adequacy of representation" issue under Rule 24(a)(2) was premised in large part upon the court's belief that Congress had opposed any participation by private citizens in "imminent hazard" litigation. See 749 F.2d at 984-90. As discussed above, however, the legislative history surrounding the recent RCRA Amendments reveals that Congress' intent was just the opposite, and that citizen intervention was encouraged in order to supplement government enforcement efforts. See note 7 supra. Indeed, Sen. Mitchell, in an apparent reference to the lower court decisions in Hooker and the instant case, explained that the express statutory intervention provision was needed precisely in order to clarify the intent of the existing law in light of "recent court opinions [that] have held to the contrary." 130 Cong. Rec. S9152 (daily ed. July 25, 1984).

reached by the Second Circuit and the court below on the intervention question, but also explain the Ninth Circuit's use of a less stringent burden on the subsidiary issue of demonstrating inadequacy of representation. It is only where the interests of the applicant may fairly be said to be identical to those of their governmental representative that the "strong showing" of inadequacy demanded by petitioners is called for; the decisions of this and other courts (including those circuits which are alleged by petitioners to have adopted a conflicting position) have consistently authorized intervention under Rule 24(a)(2) where, as here, the applicant has demonstrated a more specific, particularized interest

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than that of the general public.[18] This is especially true when the interests of the applicants and the governmental party charged with representing them are not merely dissimilar, but actually adverse. Judge Garth neatly summarized this rudimentary principle in his separate opinion in Bolden v. Pennsylvania State Police, 578 F.2d 912 (3rd Cir. 1978):

> The state's representation can be deemed adequate only so long as no interest adverse to the state appears. Once it becomes appar-ent that there is a present

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[18] See, e.g., Trbovich v. United Mineworkers of America, 404 U.S. 528, 538-40 n.10 (1972); Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967); id. at 155 (Stewart, J., dissenting); LaRouche v. Federal Bureau of Investigation, 677 F.2d 256 (2d Cir. 1982); NRDC v. United States Nuclear Regulatory Comm'n, 578 F.2d 1341 (10th Cir. 1978); National Farm Lines v. I.C.C., 564 F.2d 381 (10th Cir. 1977); NRDC v. Costle, 561 F.2d 904, 912 (D.C. Cir. 1977); Nuesse v. Camp, 385 F.2d 694, 701 (D.C. Cir. 1967); United States v. Reserve Mining Co., 56 F.R.D. 408 (D. Minn. 1972); see generally 7A Wright & Miller, Federal Practice and Procedure, § 1909, at 525 (1984).

> interest which is adverse to the interest represented by the state, then the presumption of adequacy of representation disappears. In such a situation the proposed intervenor "cannot be required to look for adequate representation to one who is his opponent . . . ."

Id. at 923 (Garth, J., concurring in part and dissenting in part) (quoting 7A Wright & Miller, supra, § 1909, at 525).[19/]

19/ In any event, the standard used by the Court of Appeals for determining adequacy of representation was immaterial to its ultimate conclusion that respondents were entitled to intervene as of right under Rule 24(a)(2). As the court noted, because of the adversity of interests between respondents and each of the existing parties, they would "in all likelihood" have met even the "strong showing" required by the court in Hooker. See Pet. Supp. App. A-19 n.6. It is hornbook law that when a party possesses interests adverse to those of a prospective intervenor, that party cannot adequately represent the intervenor's interests. See, e.g., New Mexico v. Aamodt, 537 F.2d 1102, 1106 (10th Cir. 1976); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1125 (5th Cir. 1970); Stadin v. Union Electric Co., 309 F.2d 912, 919 (8th Cir. 1962) (Blackmun, J.); 7A Wright & Miller, supra, § 1909, at 523-24 & nn. 71&72.

Thus, the Court of Appeals' opinion in this case creates no conflict with any other decisions, either in its ultimate conclusions on the jurisdictional question and on the merits, or in its consideration of subsidiary components of those issues.[20] Accordingly, there is no basis for a writ of certiorari to issue in this case.

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[20] Petitioners' attempt to manufacture a "conflict" based upon the Ninth Circuit's use of a de novo standard of review in this case borders on the frivolous. As the Court of Appeals explained, de novo review was appropriate because the specific challenge to the District Court's decision in this case involved application of a rule of law to uncontroverted facts and raised a mixed question of fact and law. Pet. Supp. App. A-12. There is nothing objectionable in this straightforward application of a longstanding principle of appellate review, and the Ninth Circuit's standard of review in intervention cases is perfectly consistent with that applied throughout the circuit courts. See generally 7A Wright & Miller, supra, § 1902. That the Court of Appeals was not expounding a general rule that all intervention orders will be reviewed de

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III. ADDITIONAL PRUDENTIAL CONCERNS MILITATE AGAINST ISSUANCE OF A WRIT OF CERTIORARI IN THIS CASE.

Finally, this Court should take note of several prudential considerations that make this case a particularly inappropriate subject of plenary review. First, the Court of Appeal's decision granting respondents the right to intervene in this action turns on factual circumstances that are unique to this complex litigation. Although the underlying action is one of many initiated by federal and state authorities seeking to facilitate the cleanup of active or abandoned hazardous waste sites, this

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20/ [Cont'd]
novo is apparent from the fact that the Ninth Circuit, consistent with this Court's decision in NAACP v. New York, 413 U.S. 345, 366 (1973), has always held that the question of timeliness is reviewed under an abuse of discretion standard. See, e.g., United States v. Oregon, 745 F.2d 550, 552 (9th Cir. 1984); Alaniz v. Tillie Lewis Foods, 572 F.2d 657, 659 (9th Cir. 1978).

case is by no means typical of those other lawsuits. Indeed, respondents are aware of no other enforcement action in which the plaintiff federal and state governments themselves bear a large portion of the responsibility and liability for creating and maintaining the hazardous conditions, thus giving rise to the adversity of interests that characterize this case. Consequently, a grant of certiorari to review the Court of Appeals' decision below will not resolve any of the larger legal and policy issues alluded to in the Petition.

Second, given the unique factual context of this case, the Court of Appeals' decision on the merits was manifestly correct. Even petitioners themselves do not strenuously argue that the Court erred in holding that respondents are entitled to intervene as of right; they object only that the decision below

conflicts with the Second Circuit's decision in Hooker. But, as discussed above, that purported conflict is readily explained by the differing facts of the two cases and is still further undermined by the intervening passage of the 1984 RCRA Amendments.[21] It would thus serve no beneficial purpose for this Court to review even the jurisdictional aspects of a decision that so clearly implements congressional intent and is so plainly justified on the merits.

Lastly, this Court should bear in mind that the Court of Appeals' judgment vindicating respondents' right to

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[21] The pendency of the Superfund reauthorization bills in Congress provides yet another reason why review by this Court is inappropriate at this time. To the extent that any doubt remains whether (and under what conditions) citizens should be entitled to intervene as of right in hazardous waste abatement suits, final passage of that legislation should resolve the issue and make consideration of the question by this Court unnecessary.

intervene was entered well over a year ago. Since that time, respondents have been actively participating both in the continuing litigation of this action and in the simultaneous effort to resolve this complex dispute through voluntary settlement. Cooperation among all of the parties has been exemplary, and not a single objection has been raised in the district court concerning any difficulties or prejudice to the existing parties resulting from respondents' intervention. Under these circumstances, review by this Court of the decision below would only foster the very disruption of orderly judicial processes that petitioners purportedly seek to avoid. Moreover, any reversal of the Court of Appeals' decision on jurisdictional grounds would return respondents (at least temporarily, see note 8 supra) to the restricted status of permissive intervenor, which

the Court of Appeals concluded would impede their ability to protect their interests. Pet. Supp. App. A-11 n.4. No countervailing considerations have been cited in this case to justify the exercise of this Court's certiorari discretion to promote such an unwarranted and unjust result.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

RCRA §7002, 42 U.S.C. §6972

§ 6972. Citizen suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

(b) Actions prohibited

(1) No action may be commenced under subsection (a)(1)(A) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation to—

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

(2)(A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to—

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment—

(i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9606];

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604];

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. § 9601 et seq.]; or

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 980[1] [42 U.S.C.A. § 9606] or section 6973 of this title pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) of this section are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment—

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section;

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604]; or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. § 9601 et seq.].

(D) No action may be commenced under subsection (a)(1)(B) of this section by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) of this section in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) of this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

(c) Notice

No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention

In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) Costs

The court, in issuing any final order in any action brought pursuant to this section or section 6976 of this title, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

(g) Transporters

A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment, or disposal, referred to in subsection (a)(1)(B) of this section taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste.

(As amended Pub.L. 98-616, Title IV, § 401, Nov. 8, 1984, 98 Stat. 3268.)

(c) In any action commenced by the President or a State, under this Act or under the Solid Waste Disposal Act, in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and such applicant is so situated that the disposition of the action may, as a practical matter, impair or impede such applicant's ability to protect that interest, unless the President or the State shows that the applicant's interest is adequately represented by existing parties.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On May 12, 1986, I served the within RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI in re: "J. B. Stringfellow Jr. vs. Concerned Neighbors in Action" in the United States Supreme Court, October Term 1985, No. 85-184;

on the Parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on May 12, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

JOINT

APPENDIX

(5)

Supreme Court, U.S.
FILED
JUL 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-184

IN THE

Supreme Court of the United States

October Term, 1985

J.B. STRINGFELLOW, JR.; et al.,
Petitioners,

vs.

CONCERNED NEIGHBORS IN ACTION, et al.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Petition For Certiorari Filed August 1, 1985
Certiorari Granted June 2, 1986

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The following orders and opinions have already been reprinted in the Appendix to the Petition for Certiorari (Pet. App.) or in the Appendix to Petitioners' Supplemental Brief In Support of Petition for Certiorari (Pet. Supp. Br. App.) at the pages indicated:

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Ninth Circuit Opinion, filed June 4, 1984 (dismissing appeal) .....Pet.App. A-22

Ninth Circuit Order, filed September 6, 1984 (reinstating appeal after rehearing) .....Pet.App. A-26

Ninth Circuit Order, filed October 26, 1984 (denying reconsideration *en banc*) ..... Pet.App. A-28

Ninth Circuit Order, filed March 18, 1985 (reversing in part, vacating in part and remanding) .....Pet.App. A-1

Ninth Circuit Opinion, filed February 18, 1986 .....Pet.Supp. Br.App. A-5

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Relevant Docket Entries
from the District Court

United States District Court
for the Central District of California

U.S.A., et al.
v.
J.B. Stringfellow, Jr., et al.

Case No. CV-83-2501 (MML) (MCX)

Date	Proceedings	
4/21/83	1.	Fld Comlnt. Issd sumns.
5/16/83	2.	Fld plft's FIRST AMENDED COMPLAINT. Issd summs.
2/17/84	217.	ORD granting lv to intervene
3/1/84	219.	Fld intervenors Concerned Neighbors NOTC OF APPEAL to 9th Cir. C/A frm Ord dtd 2-17-84. $70.00 flng fee & doc fee pd.
7/3/84	302.	Second Amd Complt. Pltf USA
7/27/84	317.	Complant in intervention Intervn

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from the Court of Appeals

United States Court of Appeals
For The Ninth Circuit

United States of America, et al.
v.
J.B. Stringfellow, Jr., et al.

84-5682

Dated 1984	Filings - Proceedings
Mar. 2	Docketed cause and entered appearances of counsel.
May 1	Filed Order (WRIGHT, SKOPIL, NORRIS) The motion to dismiss this appeal for lack of jurisdiction is GRANTED. Appellants' motion for expedited briefing and hearing is denied as moot.
May 1	FILED & ENTERED JUDGMENT
May 23	MANDATE ISSUED
June 8	AS OF JUNE 4, 1984, ORDERED OPINION(WRIGHT, CJ) FILED
June 8	AS OF JUNE 4, 1984, FILED OPINION - APPEAL DISMISSED.; The motions to dismiss were granted in an order entered May 1, 1984, This opinion explains our prior action. (casefile)

Sept 7	Filed order, as of September 6, 1984 (WRIGHT SKOPIL, & NORRIS, CJ) Opinion filed on June 4, 1984 is withdrawn. A petition for rehearing has advised us that we did not consider the effect of *State of California v. Block* F.2d 753 (9th Cir 1982) in the prior opinion. That case was not cited in the briefs or at oral argument and it was not discovered earlier because its discussion of intervention cited the wrong Rule of Civil Procedure which resulted in improper indexing. It appears that *Block* controls and is not distinguishable from this case. Denial of intervention as of right is a final appealable order, despite the grant of permissive intervention. *Block*, 690 F.2d at 776. The motion to dismiss the appeal is denied. The appeal will be calendared for a decision on the merits in due course.
Sept 20	Filed orig & 33 appellee's (MONTROSE CHEMICAL CORP) PETITION FOR RECONSIDERATION & SUGGESTION FOR RECONSIDERATION ENBANC 18 pgs 9/20/84 (PANEL & ALL JUDGES)
Oct 26	Filed Order (WRIGHT, SKOPIL, NORRIS) the petition for reconsideration is denied and the en banc suggestion is denied. The aplts' request to publish the order of Sept. 6, 1984, is denied. Their motion to expedite is granted. Briefing schedule as follows" aplt.' opening breif will be filed Nov. 15, 1984; aplees' brief are due Dec. 7 1984; reply may be filed by Dec. 17, 1984. The Clerk will calendar the

case as soon as possible. The parties shall comply with page limitations established in FRAP 28(g). The dist court is requested to forward the certificate of record as soon as possible.

1985

Mar. 6	ARGUED & SUBMITTED TO: GOODWIN, REINHARDT, CJJ; SOLOMON (OR) DJ.
Mar. 18	Filed Order (GOODWIN, REINHARDT, SOLOMON) The portion of the order of Feb. 17, 1985 denying aplts' mtn to intervene as of right is REVERSED. The portion of the order granting aplts leave to intervene permissively is VACATED. Upon remand, aplts shall be granted leave to intervene as of right. In view of the decision set forth above, we need not decide the question as to the appropriateness of the conditions that the DC attached to the apltls' participation as a permissive intervenor. We express no view as to what conditions may appropriately be placed upon the aplts' participation in the litigation in their capacity as intervenors as of right, or upon the participation of any other parties to the litigation. *An opinion will follow.* REVERSED IN PART, VACATED IN PART, & REMANDED FOR FURTHER PROCEEDINGS.
Mar. 18	FILED & ENTERED JUDGMENT

Apr 10	MANDATE ISSUED (cost pending)
Aug 15	Rec'd as of 8/12 notice from U.S. Supreme Court, re: filing of petition for writ of cert. filed in S.C.8/1/8[illegible]#85-184. (cert. filed by J.B. Stringfellow -v- Concerned Neighbors)

1986

Feb 18	ORDERED OPINION (REINHARDT) FILED & JUDGMENT TO BE FILED & ENTD.
Feb 18	Filed Opinion - REVERSED & REMANDED.
Feb 18	Filed & Entered Judgment.
June 11	Filed as of 6/6, certified copy of SC order of 6/2/86 granting certiorari

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
JUL 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-184

IN THE
Supreme Court of the United States
October Term, 1985

J.B. STRINGFELLOW, JR., et al.,
Petitioners,

vs.

CONCERNED NEIGHBORS IN ACTION, et al.,
Respondents.

On Writ of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

OPENING BRIEF FOR THE PETITIONERS

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(Additional counsel are listed on the signature pages)

July 30, 1986

Petition for Certiorari filed August 1, 1985
Certiorari Granted June 2, 1986

Question Presented for Review

Whether a district court order granting permissive intervention, but denying intervention as of right, is immediately appealable to the court of appeals.

PARTIES BELOW

Plaintiffs-Appellees:

United States of America
State of California

Defendant-Appellees:

J. B. Stringfellow, Jr.
Stringfellow Quarry Co., Inc.
Stringfellow Quarry Company
Paul Hubbs
Lucille Hubbs
E. Moe McCook
Alcan Aluminum Corp.
Alumax, Inc.
BKK Corporation
Capri Pumping Service
General Electric Co.
General Steel and Wire Co.
Hunter Engineering, Inc.
McDonnell Douglas Corp.
Montrose Chemical Corporation of California
National Distillers & Chemical Corp.
NI Industries, Inc.
Northrop Corporation
The Deutsch Company
Quemetco, Inc.
Rainbow Canyon Manufacturing Corp.
Rheem Manufacturing Co.
Rockwell International Corp.

Rohr Industries, Inc.
Standard Dredging Corp.
Stauffer Chemical Co.
Weyerhauser Co.
Wileman's Cesspool Service

Intervenors-Appellants:

Concerned Neighbors in Action
Penny Newman

A list of the subsidiaries and affiliates of each of the corporate petitioners is set forth in the appendix to the petition for a writ of certiorari at pp. A46-A58.

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No. 85-184

IN THE
Supreme Court of the United States
October Term, 1985

J.B. STRINGFELLOW, JR., et al.,
Petitioners,

vs.

CONCERNED NEIGHBORS IN ACTION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPENING BRIEF FOR THE PETITIONERS

Opinions Below

The initial opinion of the Ninth Circuit, dismissing the appeal for want of appellate jurisdiction (Pet. App. A22-A25), is unreported. A second opinion, withdrawing the initial opinion (Pet. App. A26-A27), is unreported. The Ninth Circuit's order reversing in part and vacating in part the district court's order granting leave to intervene, and remanding the case to the district court (Pet. App. A1-A2) is reported at 755 F.2d 1383. The final opinion of the Ninth Circuit (Pet. Supp. Br. App. A5-A20) is reported at 783

F.2d 821. The opinion of the district court (Pet. App. A3-A21) is unreported.

Jurisdiction

The judgment of the court of appeals was entered on March 18, 1985. On May 30, 1985, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including August 1, 1985, and the petition was filed on that date. The court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

The text of 28 U.S.C. §§ 1291, 1292 and Rule 24 of the Federal Rules of Civil Procedure is set forth in the appendix to the petition for certiorari at pages A30-A32 and A35-A36.

Statement of the Case

Petitioners are defendants in an action commenced by the United States and the State of California (collectively, the "Governmental Plaintiffs") for recovery of clean-up costs and other relief with respect to the Stringfellow waste disposal site located near Glen Avon, California. Included among the defendants in the action are the former owners of the Stringfellow site, persons who allegedly transported materials to the site and persons who allegedly generated materials which were disposed of at the site. (E.R. 350, 356-367).[1] Third-party complaints against more than 100

[1] References to "E.R." are to the Excerpts of Record filed in the Ninth Circuit.

additional thirty-party entities, as well as counterclaims against state and federal governmental agencies, have been filed by some of the defendants. (E.R. 613, 614).

The Governmental Plaintiffs' Second Amended Complaint alleges 11 claims for relief. Five of the claims for relief are asserted under the so-called "emergency relief" or "substantial endangerment" provisions of four separate federal statutes and one state statute.[2] These five claims (the "Emergency Relief Claims") seek injunctive relief with respect to alleged endangerments to the environment in and around the Stringfellow site. The Governmental Plaintiffs also have asserted four claims for relief under the cost recovery provisions of various federal and state statutes.[3] Such claims (the "Cost Recovery Claims") seek recovery of funds allegedly expended or to be expended in the future for the clean-up of the Stringfellow site. The Governmental

[2] The Governmental Plaintiffs' First Claim for Relief is asserted under Section 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9606(a). The Third Claim for Relief is asserted under Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973. The Fourth Claim for Relief is asserted under Section 504 of the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. § 1364. The Sixth Claim for Relief is asserted under Section 1431(a) of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300i(a). The Eleventh Claim for Relief is asserted under Cal. Health & Safety Code § 25358.3. These and other relevant statutes are reproduced in the appendix to the petition for writ of certiorari.

[3] The Governmental Plaintiffs' Second, Fifth, Seventh and Eighth Claims for Relief are based upon the following four statutes: Sections 104 and 107(a) of CERCLA, 42 U.S.C. §§ 9604, 9607(a); Section 311 of the Clean Water Act, 33 U.S.C. § 1321; Section 107 of the CERCLA, 42 U.S.C. § 9607; and Cal. Health & Safety Code §§ 25300-25395.

Plaintiffs also assert that the Stringfellow site is a public nuisance under state law. (E.R. 350-408).

On July 15, 1983, respondents Concerned Neighbors in Action, a corporation, and Penny Newman (collectively, "respondents")[4] petitioned the district court for leave to intervene as of right under Fed. R. Civ. P.24(a) and/or permissively under Fed. R. Civ. P.24(b). (E.R. 55-90). Respondents' proposed Complaint in Intervention alleged nine claims for relief that were virtually identical to the Governmental Plaintiffs' Emergency Relief and Cost Recovery Claims. (*Compare* E.R. 109-164 *with* E.R. 3-49). In addition, the proposed Complaint in Intervention alleged eight new claims, consisting of claims for personal injury and other individualized damages and "claims in intervention" purportedly advanced under the citizen suit provisions of three federal statutes.[5] (E.R. 108-187).

By its Order Granting Leave to Intervene (the "Order") entered on February 17, 1984, the district court granted respondents leave to intervene permissively under Fed. R. Civ. P. 24(b) but held that respondents were not entitled to intervene as of right under Fed. R. Civ. P. 24(a). (Pet. App. A3-A21). The Order specifically allowed respondents to advance claims in intervention with respect to all of the Governmental Plaintiffs' claim in which intervention was sought, except the Cost Recovery Claims. (Pet.App. A19-

[4] Other parties, including the United States and the State of California, are also respondents to the petition for certiorari under Sup. Ct. R. 19.6. For simplicity, however, the term "respondents" shall hereinafter be used to refer only to Concerned Neighbors in Action and Penny Newman.

[5] "Claims in intervention" were asserted under Section 505 of the Clean Water Act, 33 U.S.C. § 1365; Section 7002 of RCRA, 42 U.S.C. § 6972; and Section 1449 of SDWA, 42 U.S.C. § 300j-8. (E.R. 165-171).

A20). However, the Order prohibited respondents from asserting "their individualized damage and other claims." (Pet. App. A19). This limitation was imposed because the court found that "allowing applicants to assert their individualized damage and other claims would burden and expand an already complex litigation and could jeopardize the possibility of settlement." (Pet. App. 19).

In an effort "to minimize any delay and confusion involved in discovery in this large, complex case," the Order also required respondents to meet and confer with all parties and obtain the concurrence of at least one other party before initiating discovery or motions. (Pet. App. A20). However, the Order confirmed that respondents, as parties, "shall have the right to attend all other depositions and to participate to an extent not duplicative of the original parties, and to receive copies of all discovery to the same extent as any other party herein." (Pet. App. A20).

Pursuant to the Order, respondents filed their Complaint in Intervention on or about July 27, 1984, and are now parties to the ongoing district court action. (E.R. 409-477, 633).

After filing the Complaint in Intervention, Intervenor Newman and approximately 5074 other residents of the Glen Avon area commenced an action in the Riverside County Superior Court of the State of California asserting claims against more than 100 defendants (including all of the original defendants in this proceeding) for damages and other relief relating to the Stringfellow site.[6] (Addendum to

[6] Intervenor Concerned Neighbors In Action purports to represent more than 400 residents of Glen Avon, California, many or all of whom are presumably plaintiffs in the Riverside County Superior Court action. (E.R. 99-100).

Ninth Circuit Brief for Defendants-Appellees). Respondents' state court complaint purports to assert causes of action for negligence, strict products liability, strict liability for ultrahazardous activity, breach of warranty, intentional infliction of emotional distress, trespass, nuisance, misrepresentation, inverse condemnation and maintenance of a dangerous condition. *Id.*

Notwithstanding the grant of leave to intervene and the subsequent filing of their Complaint in Intervention, respondents filed a notice of appeal. (J.A. 1) Petitioners herein and the Governmental Plaintiffs moved to dismiss the appeal on the grounds that the Order was not a final or appealable order. In an opinion dated June 4, 1984, the Ninth Circuit, relying upon decisions from this Court and from three other circuits, held that the Order was not immediately appealable and dismissed the appeal. (Pet. App. A22-A25).

On September 6, 1984, however, the Ninth Circuit withdrew its initial opinion in response to respondents' petition for rehearing which asserted that the court's opinion was inconsistent with *California v. Block*, 690 F.2d 753 (9th Cir. 1982).[7] (Pet. App. A26-A27). In the

[7] *Block* involved an appeal of an injunction and judgment entered against the Forest Service for failing to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4331-4332 (1976). In connection with the post-judgment appeal, an intervenor in the case also challenged the district court's order granting permissive intervention but denying intervention as of right. None of the other parties in the case briefed the intervention question. Citing only to Ninth Circuit cases involving denials of intervention altogether (in contrast to cases where permissive intervention was granted, with or without a denial of intervention as of right), the Ninth Circuit held that the appeal of the intervention order was untimely because the order was final and appealable immediately upon its entry by the district court. 690 F.2d at 776.

September 6, 1984 opinion, the Ninth Circuit, without elaboration, held simply that *Block* was controlling and that "[d]enial of intervention as of right is a final appealable order, despite the grant of permissive intervention."[8] (Pet. App. A26). A Petition for Reconsideration and Suggestion for Reconsideration *En Banc* was denied by the Ninth Circuit on October 26, 1984.[9] (Pet. App. A28-A29).

After briefing on the merits and oral argument, the Ninth Circuit entered its March 18, 1985 *per curiam* order and judgment. That order reversed the district court's denial of intervention as of right, vacated the grant of leave to intervene permissively and remanded the action to the district court for further proceedings. The Ninth Circuit's March 18, 1985 order does not give any reasons for the decision but states that "[a]n opinion will follow." (755 F.2d at 1384).

[8] The *Block* decision was not discovered by any of the parties or by the Ninth Circuit until after the Ninth Circuit's June 4, 1984 opinion was issued because of what appears to be a misprint in the *Block* opinion. The *Block* opinion refers to an application for intervention under Fed. R. Civ. P. 19(a) instead of Fed. R. Civ. P.24(a). Accordingly, *Block* is not listed in the annotations under Fed. R. Civ. P. 24, and it was not retrieved by the parties in their computer searches under Fed. R. Civ. P. 24.

[9] On December 20, 1984, petitioners filed a petition for a writ of certiorari seeking review of the Ninth Circuit's September 6, 1984 decision (Case No. 84-999). The petition sought pre-judgment review of the Ninth Circuit's September 6, 1984 order. However, the Ninth Circuit entered its March 18, 1985 judgment before briefing on the petition was completed, thereby precluding pre-judgment review of the jurisdictional issue addressed in the September 6, 1984 order. Accordingly, petitioners moved for voluntary dismissal of the petition and the petition was dismissed pursuant to Sup. Ct. R. 53 on May 1, 1985.

On February 18, 1986—eleven months after entry of the Ninth Circuit's March 18, 1985 judgment—the Ninth Circuit issued its opinion. Concerning the jurisdictional issue pending before this Court, the Ninth Circuit's opinion simply restated the Ninth Circuit's view that it was bound by its prior decision in *California v. Block*. (783 F.2d at 825).

While awaiting the issuance of the Ninth Circuit's opinion, petitioners requested, and on May 30, 1985, Justice Rehnquist granted, an extension to and including August 1, 1985 for filing a petition for a writ of certiorari. When the Ninth Circuit still had not issued its opinion as the extension was about to lapse, petitioners, on August 1, 1985, filed their petition for a writ of certiorari. After the Ninth Circuit issued its February 18, 1986 opinion, petitioners filed a supplemental brief in support of their petition. The Court granted certiorari on June 2, 1986.

Summary of Argument

District court orders granting permissive intervention under Fed. R. Civ. P. 24(b), but denying intervention as of right under Fed. R. Civ. P. 24(a), are not "final decisions" under 28 U.S.C. § 1291 because they do not end litigation on the merits. Such orders also do not fall within the narrow "collateral order" exception to the finality rule of § 1291 because, among other reasons, such orders are intrinsically interrelated to the merits of the action and are effectively reviewable on appeal from a final judgment.

An order granting permissive intervention, regardless of whether intervention as of right is concurrently denied, permits the person requesting intervention to become a party to the litigation, with an absolute right to appeal from the final disposition of the case. Thus, an intervenor who

desires appellate review of such an order may challenge the order upon appeal from final judgment and, if an error prejudicing the rights of the intervenor was made, a new trial can be ordered. Indeed, unless and until a final judgment on the merits has been entered, it may be difficult, if not impossible, for a court of appeals to determine whether an intervenor has been prejudiced by an order permitting intervention under Fed. R. Civ. P. 24(b), but denying intervention as of right under Fed. R. Civ. P. 24(a). Accordingly, such orders do not fall within the narrow "collateral order" exception recognized by *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), and are not immediately appealable.

This conclusion is implicit in the analysis of *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519 (1947), in which this Court held that orders denying intervention altogether, where intervention as of right is requested, are immediately appealable. According to *Brotherhood*, such orders are appealable only because the putative intervenor in such a case "cannot appeal from any subsequent order or judgment in the proceeding." 331 U.S. at 524. Inasmuch as permissive intervenors, such as respondents in this proceeding, can appeal from the final district court judgment, the order permitting intervention is not immediately appealable regardless of whether intervention as of right is concurrently denied.

Furthermore, the important public policies underlying the finality rule of § 1291, as applied in several recent decisions of this Court, compel the conclusion that orders granting permissive intervention but denying intervention as of right are not immediately appealable. *E.g., Richardson-Merrill, Inc. v. Koller*, Case No. 84-127 (June 17, 1985) (orders disqualifying counsel in civil cases are not

immediately appealable); *Flanagan v. United States*, 465 U.S. 259 (1984) (orders disqualifying counsel in criminal cases are not immediately appealable); *United States v. Hollywood Motor Car Company, Inc.*, 458 U.S. 263 (1982) (orders denying motions to dismiss criminal proceedings on grounds of prosecutorial vindictiveness are not immediately appealable); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981) (orders denying motions to disqualify counsel in civil cases are not immediately appealable). As recognized by this Court last year, interlocutory appeals, such as the one now pending before the Court, "impose unreasonable disruption, delay and expense" on all concerned and seriously "undermine the ability of district judges to supervise litigation." *Richardson-Merrill, supra*, slip op. 5. The long and tortious history of the appeal now pending before this Court, and the accompanying deadlock in the underlying district court proceedings, aptly demonstrate the validity of the serious concerns expressed in *Richardson-Merrill*.

The precedents of this Court and the policies underlying § 1291's finality rule have led three different circuit courts of appeals to conclude, in a series of well-reasoned decisions, that orders granting permissive intervention but denying intervention as of right are not immediately appealable. *E.g., Kartell v. Blue Shield*, 687 F.2d 543 (1st Cir. 1982); *Shore v. Parklane Hosiery Co., Inc.*, 606 F.2d 354 (2d Cir. 1979); *Wheeler v. American Home Products Corp.*, 582 F.2d 891 (5th Cir. 1977). While these decisions are obviously not controlling here, their careful reasoning and analysis highlight the error made in this case by the Ninth Circuit in holding that such orders are immediately appealable.

ARGUMENT

I

Orders Granting Permissive Intervention, But Denying Intervention As Of Right, Are Not Immediately Appealable Because They Are Neither "Final Decisions" Nor "Collateral Orders" Falling Within Any Exception to the Final Judgment Rule

Congress has provided, in 28 U.S.C. § 1291, that the courts of appeals have jurisdiction to review "all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." This Court has previously held that a "final decision" under § 1291 is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). However, the Court has recognized a "narrow exception" to § 1291's finality rule and has held that a "small class" of certain "collateral orders" are appealable under 28 U.S.C. § 1291. *Richardson-Merrell, Inc. v. Koller, supra*, slip op. 6 *quoting Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

An order granting permissive intervention but denying intervention as of right is unquestionably not a "final decision," as defined by *Catlin*. This conclusion is obvious from the status of the district court action underlying this proceeding. No trial or other adjudication on the merits has been conducted by the district court. No final disposition of the action has been approved by the district court. The district court's order granting permissive intervention did

not, in any sense, end the litigation — it simply allowed respondents to become parties to the action. A "final decision" will be entered by the district court below only after it adjudicates the merits of the claims presented by the pending complaints.

Similarly, an order granting permissive intervention but denying intervention as of right does not fall within the so-called "collateral order" exception to the finality rule of § 1291. To fall within that exception, an order, at a minimum, "must conclusively determine the disputed questions, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted). The order in question here does not satisfy any of the three criteria set forth by *Coopers & Lybrand*.

Orders granting permissive intervention but denying intervention as of right, do not "conclusively determine the disputed questions" because a district court retains the inherent power to vacate or modify such orders, either *sua sponte* or in response to a motion, at any time prior to entry of final judgment. *Cf. Jones v. Thompson*, 128 F.2d 888, 889 (8th Cir. 1942) ("Motions to vacate orders, motions for rehearings or for new trials, and like motions are . . . intended to call its attention to errors allegedly committed by it and to afford an opportunity for their correction.")

Furthermore, orders granting permissive intervention but denying intervention as of right are not "completely separate from the merits of the action," as required by the *Coopers & Lybrand* analysis, because an appellate court can determine whether an intervenor has been legally aggrieved or prejudiced by the terms of such an order only after assessing the effect of the district court's final judgment on

the intervenor. *Cf. Richardson-Merrill, supra*, slip op. 14 ("only after assessing the effect of the ruling on the final judgment could an appellate court decide whether the client's rights had been prejudiced [by an order disqualifying counsel]").

However, neither of the first two prongs of the *Coopers & Lybrand* analysis need be examined at great length here because orders granting permissive intervention but denying intervention as of right plainly fail to satisfy the third prong of the *Coopers & Lybrand* analysis — such orders are unquestionably reviewable "on appeal from a final judgment." 437 U.S. at 468.

It is well established that once a person intervenes in an action — whether permissively or as of right — that person becomes a party to the action, with the same right to appeal the final disposition of the case as any other party. *See, United States v. California Co-operative Canneries*, 279 U.S. 553, 559 (1929) ("an appeal by one who was permitted to intervene, like an appeal by one of the original parties, must be taken directly to this Court"); *Williams v. Morgan*, 111 U.S. 684, 696 (1884) (intervenor had right to appeal from final judgment); 3B Moore's Federal Practice at 24-169 (2d ed. 1982) and cases cited therein. Thus, an intervenor who purports to be aggrieved by the terms of an order granting permissive intervention, regardless of whether intervention as of right is concurrently denied, may challenge the terms of the order granting intervention and obtain appellate review of such an order upon appeal from the final judgment in the action. If the court of appeals determines that an error prejudicing the rights of the intervenor has been made, a new trial may be ordered at that time. *See, Wheeler v. American Home Products, Corp.*, 582 F.2d 891 (5th Cir. 1977). Accordingly, an order

granting permissive intervention but denying intervention as of right is not "effectively unreviewable on appeal from final judgment," and is not immediately appealable. *Coopers & Lybrand*, 437 U.S. at 468.

This conclusion is implicit in this Court's decision and analysis in *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519 (1947). In *Brotherhood*, the Court held that a putative intervenor as of right could appeal from an absolute denial of leave to intervene. In so holding, the Court opined that orders denying permissive intervention are not immediately reviewable because a permissive intervenor "is at liberty to assert and protect his interests in some more appropriate proceeding" while orders denying intervention altogether where an absolute right to intervene has been claimed are appealable "since [the applicant for intervention] cannot appeal from any subsequent order or judgment in the proceeding." 331 U.S. at 524.

Brotherhood thus establishes that a right to immediate appellate review arises only where the aggrieved party has no future right of appeal. Subsequent decisions by the Court confirm this principle by expressly holding that interlocutory review of collateral orders will be permitted only "where denial of immediate review would render impossible any review whatsoever." *United States v. Ryan*, 402 U.S. 530, 533 (1971).

The Ninth Circuit's decision in this case is contrary to the analysis of *Brotherhood* because respondents are full parties to the district court proceeding and thus have obtained a right to appeal from the final judgment. As parties, they are able to assert their interests in the district court proceedings and in any appeal from final judgment. However, instead of requiring respondents to assert their interests in the district court and in any appeal from final judgment, the Ninth

Circuit has authorized respondents to forestall and multiply the proceedings by commencing an immediate appeal of one of the component elements of litigation. In so acting, the Ninth Circuit has scuttled the reasoning and mandate of *Brotherhood* and *Coopers & Lybrand*.

The inherent inconsistency between the Ninth Circuit's final decision and *Brotherhood* is apparent from the Ninth Circuit's analysis in its own June 4, 1984 opinion. There, the Ninth Circuit, citing *Brotherhood*, opines that an interlocutory appeal of an intervention order is appropriate only where "[i]mmediate review is necessary to protect the interests of the applicant." (Pet. App. A24). The Ninth Circuit's June 4, 1984 opinion goes on to explain that immediate review of an order permitting intervention is unnecessary, even if intervention as of right is denied concurrently, because such an order permits the applicant for intervention to become a party to the action and to protect its rights through participation in all subsequent proceedings, including post-judgment appeals. (Pet. App. A24-A25). All of this analysis, which follows naturally from this Court's decision in *Brotherhood*, was subsequently abandoned without explanation by the Ninth Circuit when it granted a rehearing and reinstated respondents' appeal on September 6, 1984 and then entered its subsequent judgment of March 18, 1985 and opinion of February 18, 1986.

A series of recent decisions by this Court further confirms the Ninth Circuit's error in holding that district court orders granting permissive intervention but denying intervention as of right are immediately appealable. In 1981, this Court held, in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), that district court orders denying motions to disqualify counsel in civil matters are

not immediately appealable. The following term, the Court held, in *United States v. Hollywood Motor Car Company, Inc.*, 458 U.S. 263 (1982), that orders denying motions to dismiss criminal proceedings on grounds of prosecutorial vindictiveness are not immediately appealable. Two years later, the Court held, in *Flanagan v. United States*, 465 U.S. 259 (1984), that district court orders granting disqualification of defense counsel in criminal proceedings are not immediately appealable. Finally, just last year, the Court, in *Richardson-Merrill, Inc. v. Koller*, Case No. 84-126 (June 17, 1985), held that district court orders disqualifying counsel in civil cases are not immediately appealable.

In its opinion reinstating the appeal (the September 6, 1984 opinion) and its final opinion on the merits (the February 18, 1986 opinion), the Ninth Circuit did not even acknowledge the existence of these recent precedents, let alone make any effort to distinguish their holdings and analysis. Yet, the analysis and policies underlying each of these recent cases are fully applicable to the jurisdictional issue that was before the Ninth Circuit and is now before this Court.

> In *Firestone*, for example, the Court opined: The decision whether to disqualify an attorney ordinarily turns on the peculiar factual situation of the case then at hand, and the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits. . . . [S]hould the Court of Appeals conclude after the trial has ended that permitting continuing representation was prejudicial error, it would retain its usual authority to

> vacate the judgment appealed from and order a new trial. That remedy seems plainly adequate should petitioner's concerns of possible injury ultimately prove well founded. . . . Permitting wholesale appeals on [the] ground [that the interlocutory order appealed from may be erroneous] not only would constitute an unjustified waste of scarce judicial resources, but also would transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in § 1291. This we decline to do. 449 U.S. at 377-378 (citations and footnote omitted).

The *Firestone* analysis is fully applicable here. A district court's decision to permit a party to intervene permissively under Fed. R. Civ. P. 24(b) and not as of right under Fed. R. Civ. P. 24(a) will, in the words of *Firestone*, rarely, if ever, represent a final rejection of a claim that cannot effectively be reviewed following judgment on the merits. Allowing immediately appeals of such orders will require the parties and the courts to bear needlessly an untold burden of lost time, effort and expense on lengthy interlocutory appeals.

This reasoning was integral to the Court's recent decision in *Richardson-Merrill*. There, the Court opined:

> [T]he final judgment rule promotes efficient judicial administration while at the same time emphasizing the deference appellate courts owe to the district judge's decisions on the many questions of law and fact that arise before judgment. Immediate review of every trial court ruling, while permitting more prompt correction of erroneous decisions, would impose unreason-

able disruption, delay, and expense. It would also undermine the ability of district judges to supervise litigation. In § 1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by "piecemeal appellate review of trial court decisions which do not terminate the litigation." Slip op. 5 *quoting United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (citations omitted).

The case now pending before this Court is perhaps a perfect example of the unreasonable disruption, delay and expense that interlocutory appeals impose upon the parties and the courts. The district court entered its "Order Granting Leave to Intervene" on February 17, 1984 — nearly two and one-half years ago. In the interim, the Ninth Circuit has considered and initially granted motions to dismiss brought by the Governmental Plaintiffs and petitioners. The Ninth Circuit has considered and initially denied a motion to expedite the appeal. It has granted a petition for rehearing and, after rehearing, has finally denied the motions to dismiss and granted the motion to expedite. It has received briefs on the merits and heard oral argument. It has issued two separate opinions and several separate orders. It has denied a second petition for reconsideration. It has denied a request for rehearing *en banc*. All of these activities have required an enormous amount of time, energy and expense, and have needlessly detracted from efforts to bring the underlying district court action to a final resolution.

The precedents of this court, and the compelling public policies underlying § 1291's final judgment rule, all lead to

the conclusion that orders granting permissive intervention but denying intervention as of right are not immediately appealable. The Ninth Circuit's unsupported conclusion to the contrary is erroneous. The Ninth Circuit's judgment should be vacated, and the action remanded with instruction to dismiss the appeal for want of jurisdiction.

II

Well-reasoned Decisions From the First, Second and Fifth Circuits Persuasively Support the Conclusion that Orders Granting Permissive Intervention, But Denying Intervention as of Right, Are Immediately Appealable

While decisions of the various circuit courts of appeal are obviously not controlling here, the analysis in decisions from the First, Second and Fifth Circuits persuasively support the conclusion that orders granting permissive intervension but denying intervention as of right are not immediately appealable. Each such decision relies upon and follows the precedents of this Court and the compelling policies underlying § 1291's finality rule.

In *Shore v. Parklane Hosiery Co., Inc.*, 606 F.2d 354 (2d Cir. 1979), for example, the Second Circuit held that an order denying full intervention as of right but granting limited permissive intervention "for the purpose of participating in . . . settlement approval hearings" was not final or appealable. In so holding, the Second Circuit opined:

> The order . . . made appellants parties to the litigation, thus giving them the right to appeal from an unsatisfactory final order. On that appeal,

> this Court may review the district court's refusal to grant all of appellants' requested relief .... The district court's order is therefore interlocutory and cannot now be reviewed on appeal.

606 F.2d at 357 (citations omitted). The Second Circuit expressly noted that its holding was intended to "comport with the Supreme Court's [long-established] policy against piecemeal appeals.' " 606 F.2d at 357 *quoting Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) and *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

Shore was followed by the First Circuit in *Kartell v. Blue Shield*, 687 F.2d 543 (1st Cir. 1982). There, intervenors who had sought intervention permissively and as of right appealed from an order granting limited or conditional intervention.[10] The First Circuit dismissed the appeal, stating:

> We . . . conclude that the district court's order in the case at bar should be treated as a grant of intervention, and as such is not now appealable. The intervenors were allowed to intervene, and as parties to the suit with full appellate rights in this action, can adequately protect their interests on appeal from a final decision. They are therefore distinguishable from would-be intervenors who if denied intervention altogether are without appellate rights unless allowed immediately to appeal.

[10] The district court in *Kartell* "did not indicate whether it had acted under authority of Rule 24(a) or Rule 24(b)" in allowing intervention. 687 F.2d at 548. However, as set forth in the portion of the First Circuit's opinion quoted in the text above, the First Circuit found it unnecessary to determine the basis for the district court's action because intervenors had a right of appeal at the conclusion of the proceedings regardless of the basis for the district court's action.

> Regardless of whether intervenors are in fact intervenors of right or whether they are entitled to raise the new claims contained in their complaint in intervention, these questions can be resolved upon completion of the proceedings before the district court with no more prejudice to the intervenors than is caused to any litigant properly denied interlocutory review of an unfavorable order. Their asserted need to protect their right of full intervention does not justify circumventing the strong federal policy against piecemeal appeals. 687 F.2d at 550 (citations omitted).

The Fifth Circuit has also held that an order denying intervention as of right but granting limited permissive intervention is not immediately appealable. In *Wheeler v. American Home Products Corp.*, 582 F.2d 891 (5th Cir. 1977), intervenors appealed after final judgment from the district court's earlier order granting limited leave to intervene "not as of right, but as a matter of permission." 582 F.2d at 894.[11] The Fifth Circuit expressly rejected appellee's argument that the appeal was untimely, opining, "the order ... did not deny intervention. It allowed intervention as a matter of discretion. Under the established rule, the order was not immediately appealable." 582 F.2d at 896. The Fifth Circuit thus proceeded to review the intervention order in connection with the appeal from the final judgment.

[11] The fact that intervenors in *Wheeler* sought intervention as of right is apparent from their argument that the existing parties did not adequately represent their interest, an element required for intervention as of right under Fed. R. Civ. P. 24(a). 582 F.2d at 894.

The decisions of the First, Second and Fifth Circuits are in accord with the controlling precedents of this Court and the policies underlying the final judgment rule. The Ninth Circuit's decision in the case at bar constituted an unwarranted and improper departure from such precedents.

CONCLUSION

The judgment of the Ninth Circuit should be vacated and the action remanded to the Ninth Circuit, with instructions to dismiss the appeal for want of jurisdiction.

Respectfully submitted,

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RESPONDENT'S

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1986

J.B. STRINGFELLOW, JR., ET AL., PETITIONERS

v.

CONCERNED NEIGHBORS IN ACTION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a district court order granting limited permissive intervention but denying intervention as of right is immediately appealable to the court of appeals.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-184

J.B. STRINGFELLOW, JR., ET AL., PETITIONERS

v.

CONCERNED NEIGHBORS IN ACTION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

OPINIONS BELOW

The initial opinion of the court of appeals dismissing the appeal for want of appellate jurisdiction (Pet. App. A22-A25) is unreported. The second opinion, withdrawing the initial opinion (Pet. App. A26-A27), is unreported. The order of the court of appeals reversing in part and vacating in part an order of the district court, and remanding the case to the district court (Pet. App. A1-A2) is reported at 755 F.2d 1383. The final opinion of the court of

appeals (Supp. Pet. App. A5-A20) is reported at 783 F.2d 821. The opinion of the district court (Pet. App. A3-A21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1985. On May 30, 1985, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including August 1, 1985. The petition was filed on that date and was granted (limited to Question 1) on June 2, 1986. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

28 U.S.C. 1291 provides in relevant part:

> The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *.

STATEMENT

1. Petitioners are defendants in an action brought by the respondents United States and the State of California to abate the release of hazardous substances from the Stringfellow Acid Pits, an abandoned toxic waste disposal site near Riverside, California. The suit, originally filed on April 21, 1983, names as defendants 28 persons, corporations, or entities who allegedly either generated or transported wastes that were dumped at the Stringfellow Acid Pits or owned or operated the pits during the period of dumping (E.R. 356-367).[1] Some of the defendants have counterclaimed against a variety of state agencies and the United States Air Force and Navy (E.R. 614). In addition, some of the defendants have filed third-party complaints naming more than 100 entities as third-party defendants (E.R. 613).

[1] E.R. refers to the excerpts of record filed in the court of appeals.

As amended, the complaint alleges 11 separate claims for relief, but the relief sought falls into only two general categories. First, under the "imminent and substantial endangerment" provisions of the applicable federal environmental statutes and under California tort law,[2] the complaint seeks an injunction requiring the defendants to "abate the release and threatened release of hazardous substances" and to "undertake such action as may be necessary to remedy the conditions which have caused or may contribute to or present an imminent and substantial endangerment to the public health, welfare and the environment" (E.R. 400-401). The second form of relief sought by the plaintiff goverments is reimbursement of the funds spent by the United States and the State of California for response, removal, and remedial costs and for damage to natural resources.[3]

2. On July 15, 1983, respondents Concerned Neighbors in Action, a nonprofit corporation, and

[2] Section 504 of the Clean Water Act (CWA), 33 U.S.C. 1364; Section 1431 of the Safe Drinking Water Act (SDWA), 42 U.S.C. 300i; Section 7003 of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. (& Supp. II) 6973; Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9606(a); Cal. Health & Safety Code § 205 (West 1979); Cal. Civ. Code §§ 3479-3496 (West 1970 & Supp. 1986).

[3] Section 311 of the CWA, 33 U.S.C. (& Supp. II) 1321; Section 107(a) of CERCLA, 42 U.S.C. 9607(a); Cal. Health & Safety Code §§ 25300-25395 (West 1984 & Supp. 1986).

Penny Newman, a resident of the vicinity of the waste disposal site, sought leave to intervene (E.R. 55, 108).[4] Respondents claimed that they had the right to intervene pursuant to Fed. R. Civ. P. 24(a)(1), on the basis of the citizen suit provisions of the various federal environmental statutes involved in this suit (E.R. 66-67).[5] Alternatively, they argued that they were entitled to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2), because they had interests which could be practically impaired by this suit and because their representation by the existing parties was inadequate (E.R. 78-82). Finally, respondents asserted that they should be permitted to intervene pursuant to Fed. R. Civ. P. 24(b) because they sought to raise claims that have questions of law and fact in common with those already presented by the government plaintiffs in this case (E.R. 83). The proposed complaint in intervention (E.R. 108) named the same defendants as does the government plaintiffs' complaint, and the first nine claims for relief parallel those of the government plaintiffs (E.R. 146-165). The remaining eight claims for relief (Numbers 10-17), however, present claims that had not already been pled by the government plaintiffs (E.R. 165-179).[6]

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[4] Although the United States and the State of California are also respondents to the petition under Sup. Ct. R. 19.6, we will hereafter refer to Concerned Neighbors in Action and Penny Newman as respondents.

[5] CWA, 33 U.S.C. 1365(b)(1)(B); SDWA, 42 U.S.C. 300j-8(b)(1)(B); and RCRA, 42 U.S.C. (Supp. II) 6972(b)(2).

[6] The tenth, eleventh, and twelfth claims were brought pursuant to the citizen suit provisions of CWA, SDWA, RCRA (33 U.S.C. 1365; 42 U.S.C. 300j; 42 U.S.C. (& Supp. II) 6972) and allege that the defendants and so-called third-party defendants had violated certain regulatory provisions or requirements promulgated under those Acts (E.R. 165-171). The thirteenth and fourteenth claims for relief allege public and private nuisance and apparently claim a cause of action on such a theory against the Air Force under the Federal Torts Claims Act (E.R. 171-175). The fifteenth and sixteenth are apparently claims sounding in state tort law under negligence and strict liability theories (E.R. 175-177). The seventeenth is an action for inverse condemnation against the State of California for taking Penny Newman's property without just compensation. Federal jurisdiction for this claim is alleged under 42 U.S.C. 1983 (E.R. 178).

The government plaintiffs supported respondents' motion to intervene insofar as they sought permissive intervention under Rule 24(b), on the condition that the respondents should be permitted to raise and address only those claims that had already been asserted by the plaintiffs and defendants (E.R. 254). The government plaintiffs opposed respondents' motion to intervene as a matter of right, and suggested that, should the court grant intervention as of right pursuant to Rule 24(a), "it should place the same conditions on the intervention as of right" as the plaintiffs proposed for permissive intervention (E.R. 254).

Several petitioners also opposed intervention as of right but suggested that permissive intervention could be granted if certain conditions were imposed (E.R. 228). The conditions suggested by petitioners were more extensive than those requested by the plaintiff governments. In addition to limiting the claims to those raised by the original parties, petitioners sought to deny intervenors the opportunity to participate in the cost recovery aspects of the litigation and to limit their participation to the remedial aspects of the case (E.R. 235-236). Petitioners also requested limitations on discovery and motions initiated by respondents (E.R. 237-238).

3. The district court granted respondents permission to intervene pursuant to Fed. R. Civ. P. 24(b) (Pet. App. A3-A21). However, the district court concluded that the citizen suit provisions of the various federal statutes did not grant respondents the right to intervene under Rule 24(a)(1) (Pet. App. A5-A14). The court also ruled that respondents' interests would be adequately represented by the existing parties (*id.* at A15-A18). Accordingly, the court denied respondents' motion to intervene as of right pursuant to Rule 24(a)(2) (Pet. App. A18).

In granting permissive intervention under Rule 24(b), the district court imposed several conditions on respondents in this litigation. First, as both the government plaintiffs and petitioners had requested, the district court found that the additional claims that respondents sought to raise would "burden and expand an already complex litigation" (Pet. App. A19). Accordingly, respondents were permitted to litigate only those claims that had been raised by the original parties (*ibid.*). Second, as requested by petitioners, the district court found that respondents' interest in the cost recovery claims under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607, Section 311 of the Clean Water Act (CWA), 33 U.S.C. (& Supp. II) 1321, and state law was akin to the interest of a taxpayer (Pet. App. A20). Accordingly, because the court concluded that respondents lacked standing to sue on that basis, the court refused to allow them to intervene as to those claims. Finally, to minimize delay and confusion in discovery, the district court restricted respondents' right to initiate discovery or motions (*ibid.*). The court emphasized that the intervenors would nevertheless be able to participate in discovery

and to receive copies of all materials the same as any other party (*ibid.*).

4. Respondents filed a notice of appeal from the district court's order. On May 1, 1984, the court of appeals dismissed the appeal (Pet. App. A23). On June 4, the court issued an opinion explaining the basis for its May 1 order (*id.* at A22-A25). The court of appeals ruled that the district court's order was not an appealable final order because "[respondent's] interests are protected adequately by their participation as permissive intervenors" (*id.* at A24). Relying upon *Kartell* v. *Blue Shield of Massachusetts, Inc.*, 687 F.2d 543 (1st Cir. 1982), and *Shore* v. *Parklane Hosiery Co.*, 606 F.2d 354 (2d Cir. 1979), the court also held that the restrictions imposed by the district court on respondents' participation in the suit did not render the district court's order immediately appealable "absent obvious prejudicial error," which the court did not find (Pet. App. A24-A25). Finally, relying on *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981), the court of appeals rejected respondents' argument that the district court's order was immediately appealable under 28 U.S.C. 1292(a)(1) as a denial of injunctive relief. The court found that respondents had failed to demonstrate that they would suffer any serious, irreparable injury from the district court's order or would be unable to challenge that order at some later point in this suit (Pet. App. A25).

On respondents' petition for rehearing, the court of appeals issued an order withdrawing its June 4 opinion and ruling that the district court's order was immediately appealable (Pet. App. A26-A27). The court explained (*id.* at A26) that a prior Ninth Circuit decision, *California* v. *Block*, 690 F.2d 753 (1982),

had ruled that intervention orders like the one at issue in this case are immediately appealable under 28 U.S.C. 1291. The court of appeals denied a suggestion for rehearing en banc filed by one of the petitioners and set an expedited briefing schedule for the appeal (Pet. App. A28-A29).

On March 18, 1985, shortly after oral argument on the merits of respondents' appeal, the court of appeals issued an order reversing the district court's denial of respondents' motion for leave to intervene as of right and vacating the order granting permissive intervention (Pet. App. A1).[7] The order expressed no view as to the appropriateness of the conditions that had been imposed by the district court on respondents' participation as permissive intervenors, and the order did not address the propriety of imposing conditions on respondents' intervention as of right (*id.* at A2). The order stated that "[a]n opinion will follow" (*ibid.*).

Eleven months later, on February 18, 1986, the court of appeals issued its opinion (Supp. Pet. App. A5-A20). On the question of appellate jurisdiction, the court reiterated its view that it was bound by its prior ruling in *California* v. *Block, supra*, that orders denying intervention as of right and granting permissive intervention are immediately appealable (Supp. Pet. App. A10-A11). On the merits, the court ruled that respondents had to make only a minimal showing that the existing parties—the federal and state plaintiffs and petitioners—would not

[7] Petitioners filed a petition for a writ of certiorari from the order of the court of appeals reinstating respondents' appeal. *Stringfellow* v. *Concerned Neighbors in Action*, No. 84-999. However, petitioners later withdrew that petition after the court of appeals entered its March 18, 1985, order.

adequately represent their interests (*id.* at A16). The court found that petitioners had made this showing because of the existence of counterclaims and third party claims against agencies of the plaintiff governments (*id.* at A16-A19).

Meanwhile, on August 1, 1985, petitioners, the owner, generator, or transporter defendants in the underlying action, filed the present petition for a writ of certiorari from the order of the court of appeals reversing and vacating the decision of the district court. On April 2, 1986, petitioners filed a supplemental brief in support of their petition for a writ of certiorari addressing the February 18, 1986, opinion of the court of appeals. On June 2, 1986, this Court granted the petition for a writ of certiorari limited to the question whether the district court's order granting respondent's motion for permission to intervene but denying their motion for intervention as of right was immediately appealable to the court of appeals.

SUMMARY OF ARGUMENT

The court of appeals held that a district court order granting limited permissive intervention, but denying intervention as of right, is immediately appealable. That ruling is plainly in error. An order of that type does not terminate the litigation, and is immediately appealable only if it fits within the "collateral order" exception to the final judgment rule adopted in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The district court's intervention order does not satisfy the strict requirements necessary to qualify as a collateral order, however, and the court of appeals should have dismissed respondents' appeal.

1. A district court order denying a would-be intervenor's application to intervene as of right and excluding the applicant from the suit is immediately appealable, since an applicant who is excluded from a suit cannot appeal from the entry of a final judgment. See *Brotherhood of R.R. Trainmen* v. *Baltimore & O.R.R.*, 331 U.S. 519 (1947). That rule has no application to this case, however. By permitting respondents to intervene, the district court made respondents parties to this case and enabled them to appeal from the entry of a final judgment. By itself, then, the district court's denial of respondents' application to intervene as of right is of no consequence: that aspect of the court's order does not hamper respondents' ability ultimately to protect their interests in this suit, nor does it prevent them from appealing an adverse final judgment.

2. The conditions imposed on respondents' participation as permissive intervenors does not render the district court's intervention order immediately appealable. First, Rule 24 allows a district court to impose conditions on an intervenor's participation in a suit. A district court's exercise of the authority granted by Rule 24 therefore does not amount to the denial of intervention. Second, because respondents are a party to this suit, they can challenge the restrictions imposed by the district court on appeal from the entry of a final judgment. If respondents are dissatisfied with the judgment entered by the district court and if their contentions are well grounded in fact and law, respondents will be able to obtain alternative or additional relief from the court of appeals, or a new trial. The district court's order therefore is not immediately appealable, because it is not effectively unreviewable on appeal from a final judgment.

Put more broadly, respondents are in the same position as a party who has had a claim dismissed or who has been limited in the discovery it may undertake. Once respondents became parties to the case, they became subject to the same rules governing the availability of interlocutory appellate review that the original parties must live by. Since none of the other parties to this suit could challenge on an interlocutory appeal a ruling by the district court dismissing one or more claims or defenses, or limiting the scope of discovery, respondents should not be permitted to do so simply because they became parties by intervening in this suit.

3. There is no reason to conclude that district court orders imposing conditions on an intervenor's participation in a case will, in the mine run of cases, satisfy the three-part test for determining the appealability of interlocutory district court orders set forth in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). Nor is there anything extraordinary about this case that takes it out of the general rule that interlocutory review of such district court orders is unavailable. Respondents' argument that immediate appellate review is necessary to allow them to have a role in the selection of the abatement and cleanup remedies ordered by the district court overlooks the fact that respondents are parties to the suit and can participate in the remedial phase of this case.

ARGUMENT

A DISTRICT COURT ORDER GRANTING LIMITED PERMISSIVE INTERVENTION BUT DENYING INTERVENTION AS OF RIGHT IS NOT IMMEDIATELY APPEALABLE TO THE COURT OF APPEALS

A. Only Narrowly Limited Categories Of District Court Rulings May Be Reviewed On Appeal Prior To The Entry Of A Final Judgment In The Case

"Finality as a condition of review," the Court has often explained, "is an historic characteristic of federal appellate procedure." *Cobbledick* v. *United States*, 309 U.S. 323, 324 (1940). See also, *e.g.*, *Flanagan* v. *United States*, 465 U.S. 259, 265 (1984); *United States* v. *Hollywood Motor Car, Co.*, 458 U.S. 263, 265 (1982). As the Court stated in *DiBella* v. *United States*, 369 U.S. 121, 124 (1962), "[t]he general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment." And a "final judgment" for this purpose is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945); accord *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373 (1981); *Coopers & Lybrand* v. *Livesay*, 437 U.S 463, 467 (1978).

The final judgment rule serves salutary purposes in both civil and criminal cases. By consolidating in one appeal all of the grounds for challenging a trial court's judgment, the rule avoids delay, promotes efficient judicial administration, and reduces the ability of litigants to harass opponents by engaging in a succession of time-consuming and costly appeals. The final judgment rule also lessens the risk that appellate courts will render abstract rulings on questions of law presented in an insufficiently developed factual context—and which, indeed, may prove to be immaterial to the ultimate disposition of the case. And most importantly, the final judgment rule gives effect to Congress's determination that litigation is best managed at both the trial and appellate levels if the district courts are free of releated second-guessing by the courts of appeals during the prejudgment stages of a case. See, *e.g.*, *Richardson-Merrell, Inc.* v. *Koller*, No. 84-127 (June 17, 1985), slip op. 9, 11; *Flanagan*, 465 U.S. at 263-265; *Firestone*, 449 U.S. at 374; *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170-171 (1974); *Cobbledick*, 309 U.S. at 324-326; *Catlin*, 324 U.S. at 234. In sum, as the Court stated in *Cobbledick* v. *United States*, "finality * * * is the means for achieving a healthy legal system" (309 U.S. at 326). For these reasons, this Court has long held that "the policy of Congress embodied in [28 U.S.C. 1291] is inimical to piecemeal appellate review of trial court decisions" (*Hollywood Motor Car Co.*, 458 U.S. at 265).

A district court order denying a petition to intervene of right, but granting a petition for limited, permissible intervention obviously does not terminate the litigation and therefore does not constitute a final judgment for purposes of 28 U.S.C. 1291. Accordingly, the district court's ruling on respondents' motion to intervene in this case is immediately appealable only if it fits within one of the few, strictly limited exceptions to the final judgment rule. The only such exception relevant here is the "collateral order" doctrine adopted by this Court in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).[8]

[8] There are a few express statutory exceptions to the final judgment rule. First, 28 U.S.C. (Supp. II) 1292(b) allows interlocutory appeals in civil cases by permission of the dis-

Cohen held that a narrow category of trial court orders that are collateral to the litigation can be immediately appealed if certain stringent requirements are satisfied. 337 U.S. at 546-547. The "small class" of prejudgment orders subject to immediate appellate review, *Cohen* stated, are those which "finally determine claims of right separable from, and collateral to, rights asserted in the action, [and are] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (*id.* at 546). As the Court has since explained, to qualify as an appealable collateral order excepted by *Cohen* from the final judgment rule, a district court order, at a minimum, must satisfy three different criteria: (1) it must conclusively determine the disputed question; (2) it must resolve an

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trict court and the court of appeals, but only when resolution of a controlling question of law may materially advance the ultimate resolution of the litigation. That exception is inapplicable here, because respondents never sought to have the district court's order certified to the court of appeals.

Second, in limited circumstances 28 U.S.C. 1292(a)(1) permits an order to be appealed as a denial of injunctive relief. See *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981). In its original opinion in this case, the court of appeals rejected respondents' argument that the district court's order could be appealed on this basis (Pet. App. A25). In its final opinion, the court of appeals did not rely on this exception as the basis for allowing respondents to appeal the district court's order (Supp. Pet. App. A10-A11), and respondents have not sought to defend the court of appeals' decision on this ground (see Br. in Opp. 24-38). Accordingly, 28 U.S.C. 1292(a)(1) is inapplicable here.

Finally, the exceptions allowing the government to take an interlocutory appeal in criminal cases (*e.g.*, 18 U.S.C. (Supp. II) 3731) are obviously inapplicable here.

important issue completely separate from the merits of the action; and (3) it must be effectively unreviewable on appeal from the entry of a final judgment. *E.g.*, *Richardson-Merrell*, slip op. 6; *Flanagan*, 465 U.S. at 265; *Hollywood Motor Car Co.*, 458 U.S. at 265; *Firestone*, 449 U.S. at 375; *Coopers & Lybrand*, 437 U.S. at 468; *Abney* v. *United States*, 431 U.S. 651, 658 (1977).[9] Because of the historic policy against piecemeal appellate review, however, this Court has repeatedly emphasized that the collateral order doctrine is a narrow and limited exception to the final judgment rule. The collateral order doctrine permits immediate appellate review of a trial court order only when strict observance of the final judgment rule "would render impossible any review whatsoever" (*United States* v. *Ryan*, 402 U.S. 530, 533 (1971)) or " 'would practically defeat the right to any review at all' " (*Flanagan*, 465 U.S. at 265 (citation omitted)). The doctrine has therefore been limited to "trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal" (*Richardson-Merrell*, slip op. 6). See also *Hollywood Motor Car Co.*, 458 U.S. at 266; *United States* v. *MacDonald*, 435 U.S. 850, 860 (1978).

The paradigmatic example of an appealable collateral order is a trial court ruling that allegedly denies a party the right to be free of the burdens of trial itself.[10] On the other hand, if the right in

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[9] *Cohen* also required that an appeal of an interlocutory order must "present[] a serious and unsettled question." 337 U.S. at 547. See also *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742-743 (1982).

[10] *E.g.*, *Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985), slip op. 12-18 (qualified immunity from liability in damages);

question can be vindicated by the reversal of an adverse judgment, or if prejudice is a component of the showing necessary to establish a violation of the right,[11] a party must await the entry of a final judgment before seeking appellate review of the district court's order. An order is not immediately appealable merely because all the facts necessary to appellate review have been fully developed,[12] because an immedi-

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Nixon v. *Fitzgerald*, 457 U.S. at 742-743 (absolute immunity from liability in damages); *Helstoski* v. *Meanor*, 442 U.S. 500, 506-508 (1979) (immunity from a criminal prosecution under the Speech or Debate Clause); *Abney* v. *United States*, 431 U.S. at 659-662 (immunity from a criminal prosecution under the Double Jeopardy Clause).

[11] *E.g.*, *Richardson-Merrell, Inc.* v. *Koller*, *supra* (disqualification of counsel in a civil case); *Firestone Tire & Rubber Co.* v. *Risjord*, *supra* (refusal to disqualify counsel in a civil case); *United States* v. *Hollywood Motor Car Co.*, *supra* (refusal to dismiss the indictment in a criminal case on the ground of alleged prosecutorial vindictiveness); *United States* v. *MacDonald*, *supra* (refusal to dismiss an indictment in a criminal case on speedy trial grounds); *Cobbledick* v. *United States*, *supra* (denial of motion to quash subpoena); *Cogen* v. *United States*, 278 U.S. 221 (1929) (refusal to suppress evidence in a criminal case).

[12] See, *e.g.*, *Richardson-Merrell, Inc.* v. *Koller*, *supra* (claim of erroneous disqualification of opposing trial counsel in a civil case); *Firestone Tire & Rubber Co.* v. *Risjord*, *supra* (claim of erroneous refusal to disqualify opposing trial counsel in a civil case); *United States* v. *Hollywood Motor Car Co.*, *supra* (claim of vindictive prosecution); *Abney* v. *United States*, 431 U.S. at 663 (claim that indictment fails to state an offense); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 29-31 (1943) (claim that indictment should be dismissed for lack of jurisdiction); *Heike* v. *United States*, 217 U.S. 423, 430-431 (1910) (claim of statutory immunity from conviction).

ate appeal would avoid a substantial burden on a party,[13] because a trial court's ruling adjudicates important questions in the case,[14] or because that ruling may be erroneous.[15] Permitting an immediate appeal on such grounds would allow the collateral order exception to swallow the final judgment rule, thereby defeating the beneficial purposes served by the rule. See *Richardson-Merrell*, slip op. 11-12. The Court's decisions therefore make clear that the collateral order doctrine is a narrow exception to the final judgment rule and is applicable to only a small class of prejudgment orders. *Id.* at 6.

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[13] See, *e.g.*, *Richardson-Merrell*, slip op. 10 (order granting disqualification of opposing counsel in a civil case is not immediately appealable despite delay resulting from need to obtain new counsel); *United States* v. *Ryan*, 402 U.S. at 532-534 (denial of motion to quash subpoena is not immediately appealable simply because compliance with the subpoena will impose a substantial burden on respondent); *Cobbledick*, 309 U.S. at 325 ("[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship").

[14] See, *e.g.*, *Carroll* v. *United States*, 354 U.S. 394, 406 (1957) ("[m]any interlocutory decisions * * * may be of grave importance to a litigant, yet are not amenable to appeal at the time entered"); *Cobbledick*, 309 U.S. at 325-326 ("rejection even of a constitutional claim * * * must await * * * conviction before its reconsideration by an appellate tribunal").

[15] See, *e.g.*, *Richardson-Merrell*, slip op. 11 ("the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress"); *Firestone*, 449 U.S. at 378 (quoting *Will* v. *United States*, 389 U.S. 90, 98 n.6 (1967)) ("interlocutory orders are not appealable 'on the mere ground that they may be erroneous' ").

B. The District Court's Order, However Characterized, Does Not Qualify As An Appealable Collateral Order

The First and Second Circuits have correctly held that district court orders of precisely the type at issue in this case—orders allowing a would-be intervenor to become a party to the suit, but restricting his opportunity to participate in the case—are not immediately appealable under the collateral order doctrine. *Kartell* v. *Blue Shield of Massachusetts, Inc.*, 687 F.2d 543, 548-550 (1st Cir. 1982); *Shore* v. *Parklane Hosiery Co.*, 606 F.2d 354, 356-357 (2d Cir. 1979); see also *Wheeler* v. *American Home Products Corp.*, 582 F.2d 891, 896-897 (5th Cir. 1977). As those courts reasoned, since the intervenor has the right to appeal from an adverse final judgment, he can obtain effective review at that time regarding the district court's ruling on his motion to intervene and the limitations imposed on his participation by the district court. See *Shore*, 606 F.2d at 357; *Kartell*, 687 F.2d at 549-551.

In this case, the court of appeals never disagreed with the First and Second Circuits that interlocutory review of such trial court orders is ill-advised. In fact, in its initial opinion in this case the Ninth Circuit followed the decisions in *Kartell* and *Shore* and held that the district court's February 17, 1984, order was not immediately appealable (Pet. App. A24). Although the Ninth Circuit reversed its field on rehearing, in so doing the court simply held (*id.* at A26) that it was bound by its earlier decision in *California* v. *Block*, 690 F.2d 753 (9th Cir. 1982), a case that was factually similar to this one. *Block*, however, stated only (690 F.2d at 776) that the denial of a petition to intervene as of right is immediately appealable; the court did not explain why such

an order is appealable when the applicant was granted leave to intervene.[16] The final opinion of the court of appeals in the present case merely reiterated its earlier conclusion that *California* v. *Block*, *supra*, was controlling (Supp. Pet. App. A10-A11). In sum, both here and in *Block* the court of appeals has failed to offer any reason why *a party* to a lawsuit may immediately appeal a district court order denying the party's petition to intervene as of right and imposing conditions on its participation as a permissive intervenor.

For the reasons given below, the district court's order in this case clearly does not satisfy the requirements necessary to qualify as an appealable collateral order. First, the reasons for allowing immediate appeal from the denial of a claimed right to intervene do not apply when a would-be intervenor has been allowed to enter the case. Second, the fact that the district court imposed conditions on respondents' opportunity to participate as a party does not

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[16] In *Block*, the district court denied a petition to intervene as of right, but granted permission to intervene. 690 F.2d at 760. On appeal from the entry of a final judgment, the applicant challenged the district court's refusal to allow intervention as of right. The court of appeals held that the applicant's appeal was untimely, on the ground that an order denying intervention as of right is immediately appealable. *Id.* at 776. In so ruling, the court did not discuss the hybrid nature of the district court's order, and it relied on a prior decision involving a denial of a petition to intervene as of right that wholly excluded the petitioner from participating in the case. See 690 F.2d at 776 (citing *County of Fresno* v. *Andrus*, 622 F.2d 436, 438 (9th Cir. 1980)). *Block* also did not consider the Ninth Circuit's earlier decision in *Van Hoomissen* v. *Xerox Corp.*, 497 F.2d 180, 181 (9th Cir. 1974), which held that a grant of limited, permissive intervention was not immediately appealable.

alter this result. Respondents are in the same position as any other party who has had one or more claims dismissed or who has been denied the right to engage in unlimited discovery. Such claims are not immediately appealable. Third, respondents' attempts to defend the court of appeals' ruling ignore the fact that respondents can challenge the district court's rulings on appeal from the entry of a final judgment.

1. It is well-established that a district court order denying a motion to intervene as of right that excludes the petitioner from the case is immediately appealable. See *Brotherhood of R.R. Trainmen* v. *Baltimore & O.R.R.*, 331 U.S. 519 (1947).[17] As

[17] See also, *e.g.*, *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 132-136 (1967) (by implication); *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 687-688 (1961); *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19, 20 (1951); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.15, at 24-164 & n.5 (2d ed. 1985 & Supp. 1985-1986) (collecting cases).

In accordance with this Court's decision in *Brotherhood of R.R. Trainmen*, the courts of appeals have uniformly allowed appellate review of district court orders denying a party's motion to intervene as of right that altogether exclude that party from the case. The courts of appeals differ, however, in the procedure they use to resolve such claims. Most circuits treat the denial of a motion to intervene as of right as a final appealable order. See, *e.g.*, *Culbreadth* v. *Dukakis*, 630 F.2d 15 (1st Cir. 1980); *Ionian Shipping Co.* v. *British Law Ins. Co.*, 426 F.2d 186, 188-189 (2d Cir. 1970); *Commonwealth* v. *Rizzo*, 530 F.2d 501, 504 (3d Cir.), cert. denied, 426 U.S. 921 (1976); *County of Fresno* v. *Andrus*, 622 F.2d at 438; *Sellers* v. *United States*, 709 F.2d 1469, 1471 (11th Cir. 1983); *United States* v. *AT & T*, 642 F.2d 1285, 1290 (D.C. Cir. 1980). By contrast, the Fifth Circuit treats such orders as final and appealable only if they are erroneous; accordingly, in that circuit, the question whether the district court's order

the Court there explained, an applicant is adversely affected by the denial of an intervention motion "where a statute or the practical necessities grant the applicant an absolute right to intervene," because there is "no other way in which he can better assert the particular interest which warrants intervention" than by participating in the case (331 U.S. at 524). Moreover, that type of order "has the degree of definitiveness which supports an appeal," since the petitioner "cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene" and becomes a party to the case (*ibid.*). As far as that party is concerned, then "the lawsuit is all over" (*Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 513 (1950)). Accordingly, a district court order denying a petition to intervene as of right and wholly excluding a would-be intervenor from the suit is a classic example of an appealable collateral order.[18]

is appealable turns on the merits of a party's intervention claim. See, *e.g.*, *Weiser* v. *White*, 505 F.2d 912, 916-917 (5th Cir.), cert. denied, 421 U.S. 993 (1975). Although the practice followed by the majority of the circuits is preferable as a construction of 28 U.S.C. 1291 and the collateral order doctrine (see *Ionian Shipping Co.*, 426 F.2d at 188-189; 3B J. Moore & J. Kennedy, *supra*, ¶ 24.15, at 24-166 to 24-168; Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 720, 740-751 (1968)), there is no practical difference between these alternative approaches.

[18] By contrast, a party ordinarily may not appeal from an order denying permission to intervene, because he will not be "legally bound or prejudiced by any judgment that might be entered in the case," and "[h]e is at liberty to assert and protect his interests in some more appropriate proceeding." *Brotherhood of R.R. Trainmen* v. *Baltimore & O.R.R.*, 331

By contrast, this lawsuit is certainly not "all over" for respondents, even though their application to intervene as of right was denied, because they have been permitted to intervene. Like any other party, respondents will have the opportunity to appeal from an adverse final judgment entered by the district court. See, *e.g.*, *Maine* v. *Taylor*, No. 85-62 (June 23, 1986), slip op. 5; *Diamond* v. *Charles*, No. 84-1379 (Apr. 30, 1986), slip op. 13; *Bryant* v. *Yellen*, 447 U.S. 352, 368 (1980); *SEC* v. *United States Realty & Improvement Co.*, 310 U.S. 434, 460-461 (1940).[19]

U.S. at 524. He therefore may appeal only if the district court abused its discretion. *Ibid.*; *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 142 (1944).

It has been argued that all denials of permissive intervention should be treated as final and appealable, but reversal should occur only if the district court abused its discretion. See 3B J. Moore & J. Kennedy, *supra*, ¶ 24.15, at 24-167 to 24-168; Shapiro, *supra*, 81 Harv. L. Rev. at 740-751; 7A C. Wright & A. Miller, *Federal Practice and Procedure: Civil* §§ 1902, 1923, at 467, 627 (1972). In practice, however, the difference between the two approaches is immaterial.

[19] Respondents are therefore wrong in asserting (Br. in Opp. 29-30 n.13) that the district court has nullified their right to intervene. Of course, in order to appeal following the entry of a final judgment, respondents must demonstrate that they have "'a sufficient stake in the outcome of the controversy' to satisfy the constitutional requirement of genuine adversity" (*Maine* v. *Taylor*, slip op. 5 (citation omitted)). See also *Diamond* v. *Charles*, slip op. 13; *Fishgold* v. *Sullivan Drydock & Repair Co.*, 328 U.S. 275, 282-283 (1946); *Boston Tow Boat Co.* v. *United States*, 321 U.S. 632, 633-634 (1944). The question whether respondents will have standing to appeal from the entry of a final judgment, however, is distinct from the question whether the court of appeals had jurisdiction to consider respondents' appeal at this stage of the proceedings.

For that reason, it is immaterial that the district court also denied respondents the right to intervene. That aspect of the district court's intervention order by itself does not hamper respondents' ability to protect their interests in this litigation or prevent them from seeking reversal of an adverse final judgment. Accordingly, the reasons given by this Court in *Brotherhood of R.R. Trainmen* v. *Baltimore & O.R.R.*, *supra*, for allowing an immediate appeal of a district court order denying a would-be intervenor's application to intervene as of right and excluding him from the suit have no relevance to this case. Instead, the applicable rule is that a district court order allowing an applicant to intervene is not subject to interlocutory appellate review. See, *e.g.*, *Brown*, v. *New Orleans Clerks Union Local 1497*, 590 F.2d 161, 164 (5th Cir. 1979); *In re 1975-2 Grand Jury Investigation of Associated Milk Producers*, 566 F.2d 1293, 1301 (5th Cir.), cert. denied, 437 U.S. 905 (1978); *EEOC* v. *AT & T*, 506 F.2d 735, 742 (3d Cir. 1974); *Van Hoomissen* v. *Xerox Corp.*, 497 F.2d 180, 181 (9th Cir. 1974): *Roach* v. *Churchman*, 457 F.2d 1101, 1105 (8th Cir. 1982); *Ionian Shipping Co.* v. *British Law Ins. Co.*, 426 F.2d 186, 188 (2d Cir. 1970); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.15, at 24-163 (2d ed. 1985 & Supp. 1985-1986); 7A C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1923, at 626 (1972).[20]

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[20] The rationale for this rule is two-fold. On the one hand, another party to the suit cannot challenge the district court's order granting intervention, because that party can raise this claim on appeal from a final judgment. On the other hand, the intervening party cannot challenge the district court's ruling insofar as it permitted him to intervene, because a

The fact that the district court imposed conditions on respondents' participation in this case as permissive intervenors does not transform the district court's ruling into an appealable "final decision." See *Shore*, 606 F.2d at 357; *Kartell*, 687 F.2d at 549-551. The fundamental purpose of Fed. R. Civ. P. 24 is to empower a person to protect his interests by entering into an on-going civil suit.[21] Nonetheless, it is well settled that a district court may impose conditions on a permissive intervenor's participation in a suit, and it is also generally recognized that a district court may also place reasonable conditions on the role played by an intervenor as of right. See *Ross* v. *Bernhard* 396 U.S. 531, 541 n.15 (1970) (recognizing this practice); cf. *Arizona* v. *California*, 460 U.S. 605, 615 (1983); *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 536-537 (1972).[22]

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party may not appeal when he does not seek to alter a judgment in his favor. See *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980); *Public Service Comm'n* v. *Brashear Freight Lines*, 306 U.S. 204, 206 (1939).

[21] See Notes of Advisory Committee on Rules (1966 Amendment), 28 U.S.C. App. at 567; F. James & G. Hazard, *Civil Procedure* § 10.19, at 511-512 (1977); 3B J. Moore & J. Kennedy, *supra*, ¶ 24.02, at 24-13; 7A C. Wright & A. Miller, *supra*, § 1901, at 464.

[22] See *Kirkland* v. *New York State Dep't of Correctional Services*, 711 F.2d 1117, 1125-1128 (2d Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *Southern* v. *Plumb Tools*, 696 F.2d 1321, 1322 (11th Cir. 1983) ("conditions can be imposed even when a party intervenes as a matter of right under Rule 24(a)(2)"); *Van Hoomissen* v. *Xerox Corp.*, 497 F.2d at 181-182; *Ionian Shipping Co.* v. *British Law Ins. Co.*, 426 F.2d at 191-192; 3B J. Moore & J. Kennedy, *supra*, ¶ 24.10[4], at 24-130; Shapiro, *supra*, 81 Harv. L. Rev. at 727-731; 7A

The Advisory Committee Notes to the 1966 Amendment to Rule 24 expressly approve this practice, stat-

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C. Wright & A. Miller, *supra*, § 1922, at 623-626; see also *Shore*, 606 F.2d at 356-357 (collecting cases).

While there are relatively few published district court decisions on this subject, it appears that, on occasion, district courts have limited or conditioned an intervenor's opportunity to participate in a case, even when intervention was granted as of right, in order, for example, to retain control of litigation that may already be far advanced. *E.g.*, *Kirkland* v. *New York State Dep't of Correctional Services*, 711 F.2d at 1125-1128 (upholding restriction on non-class members' participation in case, under Rule 24(b), for the sole purpose of objecting to a proposed settlement); *Southern* v. *Plumb Tools*, 696 F.2d at 1322 (upholding limitations on insurer's participation in suit without deciding whether insurer could intervene as a matter of right, under Rule 24(a)(2), or by the court's discretion, under Rule 24(b)); *Van Hoomissen* v. *Xerox Corp.*, 497 F.2d at 181-182 (district court has discretion under Rule 24(b) to limit permissive intervention to particular issues); *United States* v. *Massachusetts Bonding & Ins. Co.*, 303 F.2d 823, 829 (2d Cir.), cert. denied, 371 U.S. 942 (1962) (upholding district court order permitting intervention on condition that intervenor waive right to a jury trial); *Spirt* v. *Teachers Ins. & Annuity Ass'n*, 93 F.R.D. 627, 636 (S.D.N.Y. 1982) (permitting EEOC to intervene, but limiting its participation in the case); *Benson* v. *Little Rock Hilton Inn*, 87 F.R.D. 447, 449 (E.D. Ark. 1980) (permitting EEOC to intervene, but refusing to allow EEOC to assert classwide claims); *Associated Gen. Contractors* v. *Secretary of Commerce*, 459 F. Supp. 766, 772 & n.14 (C.D. Cal. 1978) (granting intervention as of right, but imposing condition that participation be limited to a prospective basis), vacated and remanded on other grounds, 448 U.S. 908 (1980); *Hall County Historical Society, Inc.* v. *Georgia Dep't of Transp.*, 447 F. Supp. 741, 746 & n.1 (N.D. Ga. 1978) (prospective intervention only allowed under Rule 24(a)); *Harris* v. *General Coach Works*, 37 F.R.D. 343, 347-348 (E.D. Mich. 1964) (intervention permitted, but intervenor not allowed to par-

ing that intervention as of right may be "subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings" (Fed. R. Civ. P. 24 advisory committee note (1966 Amendment) (28 U.S.C. App. at 567)). See *Shore*, 606 F.2d at 356 (Advisory Committee's comment that conditions may be imposed on intervenors "was not an innovative suggestion but was instead the recognition of a well-established practice"). Because Rule 24 thus contemplates that reasonable conditions may be imposed on an intervenor's participation in a given case, a district court does not exclude an intervenor from a suit simply by exercising its authority to impose such conditions.

Environmental suits like this one are no exception to that rule. Suits involving sites used by multiple waste generators can rapidly approach monumental proportions. Imposing conditions on the participation of intervenors, therefore, will often be the only feasible way to prevent already-complex and burdensome litigation from becoming virtually unmanageable.[23] Here, for example, the district court

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ticipate at trial); *Carroll* v. *American Federation of Musicians*, 33 F.R.D. 353, 354 (S.D.N.Y. 1963) (permitting applicant to intervene under Rule 24(b), but imposing conditions similar to those imposed by the district court in this case); see also *Newport News Shipbuilding & Drydock Co.* v. *Peninsula Shipbuilders' Ass'n*, 646 F.2d 117, 122 (4th Cir. 1981); cf. *Morgan* v. *McDonough*, 726 F.2d 11, 14 (1st Cir. 1984).

[23] To date, the Environmental Protection Agency has referred 61 cases to the Department of Justice for litigation under CERCLA. One case that has been partially tried illustrates the potential difficulties that a district court can face. *United States* v. *Ottati & Goss, Inc.*, Civ. No. 80-225-L (D.N.H.), involved only 17 defendants, but the bench trial held in that case consumed 110 trial days from December 1983 to February 1985. Other cases involve a larger number of parties. In *United States* v. *Conservation Chemical Corp.*, Civ. No. 82-0983-5 (W.D. Mo.), for example, the defendants and third-party defendants now number 294, including small generators, insurance carriers, and government agencies.

gave precisely that reason for limiting the claims that respondents could raise (see Pet. App. A19; see also *id.* at A20). Imposing such restrictions can also be necessary to enable the federal government to remedy the environmental damage resulting from by a hazardous waste disposal site without the delay caused by a jury trial on an intervenor's damages claims. See *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 508-511 (1959) (legal issues as to which a party has a right to a jury trial should be tried before equitable issues are resolved by the court). Indeed, the House of Representatives recognized this need in its version of the legislation providing for the reauthorization of and amendments to CERCLA, the Superfund Amendments of 1985, 131 Cong. Rec. H11619 (daily ed. Dec. 10, 1985) (H.R. 2005, 99th Cong., 1st Sess. (1985)). The report on the House's proposed amendment to CERCLA states that any person may intervene as of right when he claims "a direct public health or environmental interest in the subject of a judicial action," but "the intervenor shall only be able to raise issues relating to the selected remedy" (H.R. Rep. 99-253, 99th Cong., 1st Sess. Pt. 3, at 24 (1985) (discussing Section 113(i) of the House bill)).[24] In sum, there are important rea-

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[24] As we explained in our brief at the petition stage of the case (at 17-18), separate bills to reauthorize and amend

sons why appropriate conditions should be imposed on intervenors in complex environmental suits like this one, and there is no reason to treat suits of this type differently from other types of complex civil litigation for purposes of determining whether a district court order imposing conditions on an intervenor's participation is immediately appealable.

Moreover, once an intervenor becomes a party to a lawsuit he gains the right to appeal from a final judgment, regardless of whether his application to intervene as of right has been denied and despite any conditions placed on his participation in the proceedings in district court. He therefore has no need to take an interlocutory appeal. If the district court does not impose any restrictions on his participation in the case, the question whether he had the right to intervene effectively becomes moot. If, on the other hand, the court does impose restrictions, a permissive intervenor may challenge the district court's denial of its petition to intervene as of right (if it is still relevant), as well as any conditions imposed on its participation in the case, following the entry of a final judgment. In either case, then, the district court's denial of an applicant's petition to intervene as of right is of no moment; only the conditions placed on its participation have any significance, and they may be challenged on appeal following the entry

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CERCLA have been passed by the Senate and the House. The Superfund Improvement Act of 1985, 131 Cong. Rec. S12184 (daily ed. Sept. 26, 1985) (Senate bill); the Superfund Amendments of 1985, 131 Cong. Rec. H11619 (daily ed. Dec. 10, 1985) (House bill). As of this date, the bills, both renumbered as H.R. 2005, 99th Cong., 1st Sess. (1985), are still pending before a conference committee.

of a final judgment.[25] By itself, therefore, the imposition of conditions on an intervenor does not render an otherwise nonappealable order granting permissive intervention immediately appealable under *Brotherhood of R.R. Trainmen* v. *Baltimore & O.R.R.*, *supra*, on the ground that the applicant has been denied the right to intervene.

These principles control this case. Here, the court of appeals found that respondents had erroneously been denied the right to intervene and held that respondents did not forfeit this right by participating as permissive intervenors (Supp. Pet. App. A13-A20). Although the court of appeals suggested that the conditions imposed by the district court on respondents' participation as permissive intervenors were burdensome (*id.* at A11 n.4), the court of appeals expressly left undecided the question whether the district court on remand could reimpose those conditions on respondents as intervenors as of right (Pet. App. A2). Hence, the court of appeals plainly did not believe that the reimposition of these conditions on respondents would amount to a denial of the right to intervene (and it is difficult to see what was accomplished by the court's allowance of a disruptive interlocutory appeal).

2. We submit that an appropriate guiding principle for cases of this type is that once an applicant to intervene becomes a party to the case, he must comply with the same rules governing appellate review of district court orders that apply to the original parties to the case. Put another way, the fact that respond-

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[25] Of course, the imposition of conditions may limit the res judicata effect on the intervenor of any judgment adverse to him and, for that reason (as well as others), may not be an abuse of discretion reversable on appeal.

ents intervened in this suit does not allow them to obtain interlocutory appellate review of district court orders that is unavailable to any of the other parties to the case. Otherwise, respondents would enjoy a status superior to the one held by the original parties. Nothing in Rule 24, however, supports such an anomalous result; the purpose of the Rule is to allow a person to enter an ongoing lawsuit, not to provide him with privileges unavailable to the original parties to the dispute.

This analysis requires that the court of appeals' judgment be set aside. Limited permissive intervenors, such as respondents, are in no different position from that of any other party who has had a claim dismissed or who has been limited in the scope of discovery that it may undertake (or in the evidence that it may introduce). Orders of that type may not be immediately appealed. See, *e.g.*, Fed. R. Civ. P. 54(b); *Curtiss-Wright Corp.* v. *General Elec. Co.*, 446 U.S. 1, 7-10 (1980) (Rule 54(b)); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 232 (1979) (Rehnquist, J., concurring) (discovery orders are not immediately appealable, citing *Cobbledick* v. *United States*, *supra*); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427 (1956) (Rule 54(b)); 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Civil* §§ 3914, 3915, at 542, 567-568, 591 (1976 & Supp. 1984); 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil* § 2653, at 25-26, 31 (2d ed. 1983).[26] The rule should be no different for an intervenor.

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[26] If the validity of the conditions placed upon an intervenor's participation in a particular case are both crucial to the future conduct of the case and questionable as a matter of law, 28 U.S.C. (Supp. II) 1292(b) provides an appropriate avenue for seeking immediate appellate review of such interlocutory orders. See *Coopers & Lybrand*, 437 U.S. at 474. In exceptional circumstances, appellate courts may supervise the manner in which district courts control litigation through a writ of mandamus, rather than interlocutory appeal. In the Ninth Circuit, for example, mandamus has been wielded quite usefully under the standards set out in *In re Cement Antitrust Litigation*, 688 F.2d 1297 (9th Cir. 1982). See, *e.g.*, *United States* v. *United States District Court*, 717 F.2d 478, 481 (9th Cir. 1983).

In all these situations, the need to await the entry of a final judgment entails the risk that all or part of the case on the merits will have to be retried if the district court's ruling is reversed on appeal. But that possible burden is simply the normal consequence of the generally beneficial practice of delaying appellate review of interlocutory district court orders until the entry of a final judgment. And, as we have earlier explained (pages 12-17), the overall and historic policy underlying our appealability jurisprudence is that the disadvantages of disrupting trial proceedings with interlocutory review generally outweighs the occasional burden of errors requiring retrial.

3. Respondents offer two arguments in defense of the court of appeals' ruling; neither is persuasive.

a. Respondents contend (Br. in Opp. 32-33 n.14) that there is a substantial interest in a speedy and complete cleanup of the Stringfellow waste disposal site and that, as a practical matter, the relief granted by the district court in this lawsuit will be the only remedy for this particular hazardous waste site. Thus, respondents argue that it is necessary for them to participate in the suit at this time and that, to do so, they need an immediate appellate resolution of the

validity of the district court's intervention order. That argument is flawed in several respects.[27]

First, respondents are parties to this suit and can participate in its remedial stage (except for the cost recovery aspect) under the district court's intervention order, which allows them to litigate the same claims that were asserted by the government plaintiffs. If respondents believe that the remedies required by the district court are inadequate, respondents can seek relief from that judgment in the court of appeals, whether in the form of alternative or additional remedies or a new trial. Indeed, respondents will be able to press their claims for relief on appeal even if the original parties to this suit ultimately settle their claims and agree to the entry of a consent decree. See *Local 93, International Ass'n of Firefighters* v. *City of Cleveland*, No. 84-1999 (July 2, 1986), slip op. 26-27. Accordingly, there is no merit to respondents' claim that the district court's order unfairly prevents them from being able to protect their interests.

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[27] Respondents' reliance (Br. in Opp. 29 n.13) on *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964), is misplaced. That case was a Jones Act suit in which the district court dismissed certain wrongful death claims brought by the decedent's mother on her own behalf and all of the claims brought by the mother on behalf of her other children as administratrix of her son's estate. The plaintiff sought to appeal and a writ of mandamus. Without ruling whether appeal or mandamus was appropriate, the court of appeals decided the merits of the appeal (see 321 F.2d 518, 522 (6th Cir. 1963)). This Court upheld the court of appeals' disposition on the peculiar facts of that case. 379 U.S. at 152-154. In *Coopers & Lybrand*, a unanimous Court limited the ruling in *Gillespie* to its facts, cautioning that "[i]f *Gillespie* were extended beyond the unique facts of that case, § 1291 would be stripped of all significance." 437 U.S. at 477 n.30.

Second, this Court has made clear that "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll* v. *United States*, 354 U.S. 394, 405 (1957). The Court has twice recognized that the factual circumstances that underlie a particular would-be appellant's claim, however "extraordinary" they are alleged to be, are immaterial for the purpose of determining whether a district court order rejecting that claim qualifies under the collateral order doctrine. See *MacDonald*, 435 U.S. at 857-858 n.6; *Carroll*, 354 U.S. at 405; cf. *Richardson-Merrell*, slip op. 14. Under the governing jurisdictional statute, 28 U.S.C. 1291, the courts of appeals have the power to review only "final decisions," a concept that Congress defined "in terms of categories," not individual cases (*Carroll*, 354 U.S. at 405). Accordingly, whether the district court's intervention order in this case is an appealable "final decision" depends on whether such orders, "in the generality of cases" (*ibid.*), fit into that well-defined and narrowly-circumscribed category of interlocutory orders adjudicating rights that "can and should be protected by appeal prior to judgment" (*Richardson-Merrell*, slip op. 12).

District Court orders imposing conditions on intervenors fail that test, because the diverse types of conditions that the district courts can impose on an intervenor (see pages 24-26 note 22, *supra*) prevent a confident prediction that such orders will, "in the generality of cases," satisfy the three components of the *Coopers & Lybrand* test. There is no reason to believe that such pretrial orders typically will "conclusively determine the disputed question" (437 U.S. at 468) and will involve issues that are "completely separate from the merits of the action" (*ibid.*; see

Richardson-Merrell, slip op. 14). And, clearly, a limited permissive intervenor's contention that he should not be subject to conditions will not "perish" if it is not reviewed prior to the entry of a final judgment (*Firestone*, 449 U.S. at 377). As a party to the case, a limited permissive intervenor can appeal from an adverse final judgment and can raise his claims at that time. If those claims are well grounded in fact and law, he will be able to obtain relief from the court of appeals in the form of a new trial, which, as this Court has recognized, is normally a "plainly adequate" remedy for a party's claims (*id.* at 378). Respondents have offered no reason why that remedy will necessarily be futile for this category of orders.

The district court's order in this case illustrates that point. That order can be classified in either of two ways: (1) as the imposition of conditions on respondents' intervention, or (2) as the partial dismissal of respondents' claims and as a limitation on its opportunity to engage in discovery and to file motions. Regardless of how that order is classified, it does not satisfy the *Coopers & Lybrand* test. It is wholly speculative whether that order will prevent respondents from obtaining any item in discovery they may seek or from filing any particular motion, because the district court's order allows respondents to file any discovery request or any motion in which one other party has joined (Pet. App. A20). Similarly, respondents' damages claim will not perish if they are unable to raise their claims on appeal at this stage of the case. Finally, respondents have the opportunity to participate in the remedial aspect of this litigation even under the district court's order.

This case therefore persuasively illustrates that district court orders granting limited permissive intervention do not "in the generality of cases" satisfy the *Coopers & Lybrand* test.

b. Respondents also maintain (Br. in Opp. 29-30 n.13) that they should be allowed to seek interlocutory appellate review of the district court's intervention order because that order places them in "the worst of all worlds," since it denied them the right to intervene, but binds them under the judgment entered in this case. That argument is also flawed. Respondents can appeal from the entry of a final judgment if they are dissatisfied with its terms. Moreover, the precise res judicata effect on respondents of any judgment that may be entered in this case cannot be determined at this time. Respondents are also in the same position that they would have occupied if the district court had granted their motion to intervene as of right, but imposed the same conditions upon their participation, a result that the court of appeals did not foreclose (Pet. App. A2).[28] Finally, the cost to respondents of going forward in the case despite the possibility that another trial may be necessary is no greater than, for example, the cost to litigants whose trial counsel has been disqualified, and it is well settled that such disqualification orders are not immediately appealable. See *Richardson-Merrell, Inc.* v. *Koller*, *supra*; *Flanagan* v. *United States*, *supra*. There is, in sum, no basis for permitting respondents to take an interlocutory appeal, in contravention of the final judgment rule.

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[28] Respondents have not sought review by this Court of the court of appeals' judgment.

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
OCT 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-184

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

J.B. STRINGFELLOW, JR., et al.,
Petitioners,

vs.

CONCERNED NEIGHBORS IN ACTION, et al.,
Respondents.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Does the simultaneous grant of limited permissive intervention deprive an applicant of the right to an immediate appeal of a final order denying intervention as of right?

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STATEMENT OF THE CASE

This petition arises out of the efforts of the citizens living in the vicinity of the Stringfellow Acid Pits toxic waste dumpsite to participate in the litigation that may determine the very fate of their community. After years of delay, the United States and the State of California finally initiated this action to abate the "imminent and substantial endangerment" posed by the "release and threatened release of hazardous substances" from the Acid Pits. Almost immediately after the lawsuit was filed, respondents Concerned Neighbors in Action ("CNA") and Penny Newman[1] moved to intervene as of right under Fed. R. Civ. P. 24(a). Realizing that this lawsuit would effectively establish the remedial plan for the Stringfellow site, respondents sought to ensure that any court-ordered or -approved clean-up program would fully protect their health and safety by requiring the immediate removal of all hazardous substances from the site — relief that the governments had not requested.

The District Court, however, denied respondents the right to intervene, relying on the unprecedented assumption that they would be adequately represented by the very same parties who created and failed to abate the toxic hazard, and who — in response to the claims asserted by respondents against each of them — continued to deny any liability for the site's condition. Although the District Court allowed respondents to intervene permissively, it imposed such disabling restrictions on their ability to participate in the litigation that they were essentially relegated to the status of *amicus curiae*. Respondents therefore sought immediate review of the District Court's decision, and the Court of

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[1] CNA is a nonprofit citizens' group representing over 400 families who live in the communities immediately surrounding the Stringfellow Acid Pits. Penny Newman is chairperson and co-founder of CNA.

Appeals — after concluding that the intervention order was final and appealable — reversed, finding that respondents were entitled to intervene as of right.

Petitioners[2] now contend that the Court of Appeals was without jurisdiction to review the District Court's intervention decision. Relying on respondents' status as a permissive — albeit severely restricted — intervenor under the terms of the trial court's order, petitioners assert that a right to immediate appellate review exists only where the aggrieved party has no future right of appeal from final judgment. The finality doctrine, however, is neither as rigid nor as narrow as petitioners' argument would suggest. Both Congress and the courts have recognized that the purposes underlying the final judgment rule are sometimes best served by allowing immediate appeal from orders other than technically final judgments. As is demonstrated below, the District Court's intervention order was immediately appealable under a number of well-established qualifications to strict finality. Because the Court of Appeals' decision to entertain respondents' appeal was thus fully consistent with the precedents of this Court, its judgment granting respondents the right to intervene in this action should be affirmed.

A. History of the Site

From 1956 until the site's closure in 1972, over 33.9 million gallons of hazardous wastes, including highly toxic heavy metals and potentially lethal carcinogenic organic chemicals, were deposited at the Stringfellow Acid Pits. (Excerpt of Record ("E.R.") 442-49.) Despite discharge restrictions requiring that all wastes be confined to the site, it became apparent by 1969 that contaminants were

[2] For convenience, the defendant petitioners and the United States are jointly referred to herein as "petitioners."

escaping into the adjacent Pyrite Creek, through which surface water flows down to the neighboring community of Glen Avon, California, and then into the Santa Ana River, threatening contamination of the essential drinking and agricultural water supply — the Chino III Acquifer — for over 35,000 residents of the surrounding communities.[3]

Designed and constructed under the State of California's supervision during the early 1950's, the Acid Pits were privately operated until public safety concerns compelled their closure in 1972 and their takeover by the State in 1975. When the toxic releases continued unabated in the ensuing years — including the intentional release by the State of over 800,000 gallons of contaminated water in 1978 — residents of the surrounding communities formed Concerned Neighbors in Action ("CNA") and organized efforts to secure a full clean-up of the site, to monitor the performance of responsible government agencies, and to inform the public about the dangers associated with the Acid Pits. Rather than *removing* the wastes, however — as CNA demanded — the State instead merely initiated a study that ultimately led only to further efforts to *contain* the wastes on-site.[4] These measures have proven ineffective

[3] Excerpt of Record in Court of Appeals ("E.R.") 430-31. Recent evidence indicates that the adjacent groundwater basins are also at risk, bringing the total population dependent upon the water supply threatened by Stringfellow to over 500,000 people. *See, e.g.*, Trezek, *Engineering Case Study of the Stringfellow Superfund Site*, at 17 (Congressional Office of Technology Assessment, August 1984). In addition, recent data from well samples downgradient from the site show radioactive contamination of the water supply. (E.R. 411.) As a result, hundreds of Glen Avon families have now been forced to rely on bottled water.

[4] The State's Regional Water Quality Control Board recognized in 1980 that total removal of waste materials from the Stringfellow site was the "most appropriate alternative for abating the nuisance condition." Resolution No. 80-219, California Regional Water Quality Control Board, Santa Ana Region (December 12, 1980). Due to lack of

— indeed, they may well have exacerbated the hazards at and around the Acid Pits —and releases of wastes from the Site have continued uncontrolled and unabated to the present day.

Likewise, the federal government did nothing to alleviate the hazards at Stringfellow. In fact, its agencies were among the first and largest dumpers of wastes at the site; the Air Force, for example, was the ninth largest dumper by volume. Moreover, in 1983 the House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce discovered that top officials of the Environmental Protection Agency ("EPA") had deliberately withheld over $6.1 million in "Superfund" monies that were specifically designated for the clean-up of Stringfellow, thereby further delaying implementation of the remedial measures urgently needed to abate the hazardous conditions at the Acid Pits.[5]

B. Proceedings Below

On April 21, 1983, the United States and the State of California filed this action, seeking to compel 28 waste generator, transporter, and owner individuals and companies ("petitioners") to abate the release of hazardous chemicals from the Acid Pits and to reimburse the governmental plaintiffs for the funds expended by them in response to the imminent hazard to the public health and safety. Notably absent from the defendants named in the complaint, however, were the responsible agencies of the

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sufficient funds, however, the Board opted for the less costly — but ultimately ineffective — containment alternative. *Id.*

[5] *See Report on the President's Claim of Executive Privilege Over EPA Documents, Abuses in the Superfund Program, and Other Matters*, House Committee Print 98-AA, 98th Cong., 2d Sess. (August 1984).

federal and state governments, which had dumped substantial amounts of wastes at the Acid Pits, had supervised the design, construction, and maintenance of the site, and had failed to fulfill their statutory duty to abate the releases and to protect the public and the environment.

On July 15, 1983, respondents CNA and Newman filed a motion to intervene as of right pursuant to Fed. R. Civ. P. 24(a) as representatives of the residents, taxpayers, and property owners in the communities surrounding the disposal site. Respondents alleged that, due to their constant, unavoidable proximity to the site and their reliance upon the area's endangered groundwater supply for personal and agricultural uses, they have an undeniable interest in the outcome of the proceeding — an interest that has not been, and cannot be, adequately represented by the original parties to the action, all of whom caused or contributed to the creation of the existing hazard.[6] Respondents further asserted that because the disposition of this action will inevitably determine the course of clean-up for the Acid Pits, their interests in an expeditious and effective remedy would as a practical and legal matter be impaired without their full participation in the action. In addition, respondents claimed an unconditional statutory right to intervene under the Federal Water Pollution Control Act ("CWA"), 33 U.S.C. § 1365, Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C.

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[6] Respondents' unique interest stems from the obvious fact that they, more than anyone, are the victims of petitioners' conduct at Stringfellow, and, as a result, they have suffered significant damage to their health and property, to an extent yet unknown. For example, respondents alleged specifically that they have suffered "increased health disorders, including anxiety, respiratory ailments, urinary tract infections, stomach ailments, skin rashes, headaches, tumors, and an inordinately high rate of birth defects almost double the expected rate." (E.R. 427.)

§ 6972, and Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-8.[7]

On February 17, 1984, the District Court issued an order denying respondents' motion for leave to intervene as of right. Pet. App. A3-A21. Although conceding that respondents possessed "a direct and substantial interest in the immediate abatement of further toxic waste releases" (*id.* at A15) and "have suffered more directly and immediately from the effects of toxic wastes" (*id.* at A17), the District Court found that respondents' interests were adequately represented by the original parties. Acknowledging the "conflicts of interest" between respondents and all of the original parties, the Court nonetheless posited that respondents could be represented on some of their claims by the plaintiffs and on others by the defendants — in effect, that respondents could be represented by their adversaries in the litigation. *Id.* at A16-A17. Instead, the Court nominally granted respondents leave to intervene permissively, but prohibited them from (1) asserting any claims not already asserted by the original parties; (2) intervening in the plaintiffs' cost recovery claims; and (3) initiating any motion or discovery without first (a) meeting and conferring with all the original parties and (b) obtaining the concurrence of at least one such party to the initiation of the motion or discovery. *Id.* at A19-A20. Significantly, none of the other 30 parties to the action is subject to any of these limitations.

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[7] In conjunction with their application, respondents lodged a proposed Complaint-in-Intervention, asserting claims not only against the defendant generators, transporters, and owners, but also against the responsible agencies of the plaintiff governments. (E.R. 108-84.) As described below, respondents joined in the plaintiffs' request for relief against the defendants, but also asserted additional legal claims and sought additional injunctive relief against both the plaintiffs and defendants, including permanent abatement of the hazard by total removal of all hazardous substances from the site.

Following respondents' filing of a notice of appeal, petitioners moved to dismiss, contending that the District Court's order was not a final, appealable decision. Although the motions were initially granted (*id.* at A22-A25), the Court of Appeals subsequently granted respondents' petition for rehearing, vacated its previous dismissal, and reinstated the appeal. *Id.* at A26-A27. Following briefing and hearing of the appeal on the merits, the Court of Appeals issued an order on March 18, 1985, reversing the District Court's denial of intervention as of right and vacating the grant of permissive intervention. *Id.* at A1. The Court set forth the basis for its order in an opinion issued on February 18, 1986, unanimously reaffirming its prior conclusion that the District Court's decision was a final appealable order and holding on the merits that respondents had met the requirements for intervention as of right under Fed. R. Civ. P. 24(a)(2). Pet. Supp. App. A5-A20. Specifically, the Court of Appeals found that "disposition of the litigation may, as a practical matter, impair [respondents'] ability to protect [their] interests" (*id.* at A16), and further that "there exists a genuine possibility that, in the absence of intervention, the existing parties will 'bargain away' the third party's interests rather than vigorously represent those interests at the possible expense of their own liability." *Id.* at A18.

On June 2, 1986, this Court granted the petition for certiorari limited to the question whether the District Court's order denying intervention as of right but granting limited permissive intervention is immediately appealable.

SUMMARY OF ARGUMENT

Although the District Court's intervention order is not a "final judgment" in the technical sense that it ends the litigation on the merits, the Court of Appeals' decision permitting its immediate appeal is fully consistent with a

number of well-established qualifications to the requirements of strict finality. First, when given the "practical rather than a technical construction" that this Court's decisions demand (*see, e.g., Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)), the District Court's order is properly construed as a denial of intervention, which has long been held to be a final and appealable order under § 1291. Not only did the District Court expressly reject respondents' asserted right to intervene under Rule 24(a), but it effectively denied intervention altogether by depriving respondents of the most basic substantive and procedural rights traditionally deemed essential to a party's ability to protect its interests. Although petitioners cite respondents' right to appeal after final judgment as a fully adequate safeguard, that right is but one of the "necessary incidents of the right to intervene" that this Court has identified as determinative on the question of appealability. *Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 525 (1947). Where, as here, "a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying intervention becomes appealable." *Id.* at 524. In this case — an "imminent hazard" action arising out of the risk of toxic contamination that threatens respondents' community — the Court of Appeals' conclusion that this standard has been met is eminently reasonable.

Second, the District Court's intervention order is appealable as well under § 1291 because it falls within "that small class which finally determines claims of right separable from, and collateral to, rights asserted in the action." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546. The question of respondents' right to intervene — conclusively determined by the District Court's order — is manifestly collateral to the underlying merits of this action, and appellate consideration of this issue will be unaffected by any subsequent developments in the lower court. More

important, the District Court's order is effectively unreviewable from final judgment, both because the imminence of the hazard renders an immediate appeal essential if respondents' right to intervene is to have any practical value and because the disabling restrictions imposed on their participation — precluding them even from making the very record universally required as a precondition to meaningful appellate review — have foreclosed any effective challenge to the District Court's order at the conclusion of trial.

Third, the Court of Appeals' decision is justified under 28 U.S.C. § 1292(a)(1), which authorizes the immediate appeal of any interlocutory order that has the "practical effect" of "refusing an injunction." *Carson v. American Brands, Inc.*, 450 U.S. 79, 83-84 (1981). By restricting respondents to the claims asserted by the original parties, the District Court's intervention order not only prohibits respondents from pursuing the broader injunctive relief prayed for in their Complaint-in-Intervention — including the total removal of all hazardous wastes from the Stringfellow site — but limits the parties against whom relief may be obtained. Perhaps worse, the unprecedented motion and discovery restrictions imposed by the Court on respondents alone prevent them from even requesting, much less securing, any preliminary injunctive relief that the spread of contaminants may necessitate. In light of the continuing urgency of the threat to respondents' health and welfare, the "serious, perhaps irreparable consequences" that they will suffer from the District Court's order pending appeal after final judgment plainly support the Court of Appeals' decision to entertain respondents' appeal. *Id.* at 84.

Finally, the Court of Appeals' decision upholding the appealability of the District Court's intervention order is consistent with this Court's endorsement of a pragmatic approach to finality. Ultimately, determining the appealability of a particular order requires the balancing of a

number of countervailing considerations, "the most important of which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964). In this case, none of the costs typically associated with interlocutory review is implicated; indeed, immediate appellate review of the District Court's order could only expedite the ultimate resolution of this litigation and reduce the overall burden on the judicial system. Conversely, any extended delay in restoring respondents' right to participate meaningfully in this action would "work a great injustice on them." *Id.* at 153. Under these circumstances — particularly now that the Court of Appeals has found the District Court's decision to be clearly incorrect as a matter of law — the policies Congress sought to promote under §§ 1291 and 1292 can best be achieved by permitting immediate review of the District Court's order and affirming the judgment of the Court of Appeals.

ARGUMENT

I. THE DISTRICT COURT'S INTERVENTION ORDER IS IMMEDIATELY APPEALABLE UNDER 28 U.S.C. § 1291.

In applying the principle of finality codified in 28 U.S.C. § 1291, this Court has emphasized in a number of contexts that § 1291 refers not to final *judgments*, but to final *decisions*. Thus, "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Mitchell v. Forsyth*, — U.S. —, 105 S.Ct. 2806, 2815 (1985) (quoting *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964)). Instead, giving the finality requirement a "practical rather than a technical construction," *Cohen v. Beneficial Industrial Loan Corp.*,

337 U.S. 541, 546 (1949), the courts must decide in each instance whether allowing an appeal from a particular kind of order would comport with the purposes of § 1291. In making this determination, "the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' " *Gillespie*, 379 U.S. at 152-53 (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)). In particular, "the finality requirement should 'be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.' " *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376 (1981) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976)).[8]

These considerations weigh strongly in favor of allowing the immediate appeal of the denial of respondents' right to intervene in this case — an "imminent hazard" action arising out of the undeniable risk of toxic contamination that threatens respondents' community. Although not a "final judgment" in its literal sense, the order here in issue — rejecting respondents' right to intervene and denying them the basic rights accorded any other party to file motions, conduct discovery, or assert relevant claims — bears the requisites of finality that bring it within the scope of § 1291. As discussed below, the District Court's order is thus properly appealable under § 1291 both (1) because it conclusively denies respondents' right to intervene and effectively to participate in an action critical to the

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[8] The absence of a rigid formulation of finality has been repeatedly noted. Indeed, in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170-71 (1974), this Court observed that "determining the finality of a particular judicial order may pose a close question. No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future." *See also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964); *McGourkey v. Toledo & Ohio C.R. Co.*, 146 U.S. 536, 544-45 (1892).

protection of their interests, *Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 524-25 (1947), and (2) because it "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546.

A. The District Court's Order Is Immediately Appealable As An Effective Denial of Intervention.

Although an order denying leave to intervene in an action is not the "final decision" in a case, this Court and others have long established that the denial of intervention as of right is a final appealable order.[9] This fundamental principle formed the basis for the Court of Appeals' unanimous decision allowing respondents to appeal the denial of their right to intervene in this action. Finding that respondents' "limited status as a permissive intervenor impedes [their] ability to fully prosecute [their] claims" (Pet. Supp. App. A11 n.4), the Court of Appeals held that the "order denying intervention as of right is a final appealable

[9] *See, e.g., Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 688 (1961) ("If appellant may intervene as of right, the order of the court denying intervention is appealable.") (quoting *Sutphen Estates v. United States*, 342 U.S. 19, 20-21 (1951)); *Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 524-25 (1947); *Blake v. Pallan*, 554 F.2d 947, 951 n.5 (9th Cir. 1977) ("The majority rule, followed by this Circuit, is that where a party is entitled to intervene as a matter of right, an order denying intervention is appealable."); *McClune v. Shamah*, 593 F.2d 482, 485 (3d Cir. 1979); *Corby Recreation, Inc. v. General Electric Co.*, 581 F.2d 175 (8th Cir. 1978); *Ionian Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186, 188-89 (2d Cir. 1970); *Nuesse v. Camp*, 385 F.2d 694, 699 n.2 (D.C. Cir. 1967).

order, notwithstanding a simultaneous grant of permissive intervention." *Id.* at A10-A11. Because petitioners now contend, however, that the District Court's discretionary *grant* of limited permissive intervention overrides the otherwise final *denial* of respondents' right to intervene for purposes of appealability, the critical question before this Court is whether the Court of Appeals, in giving the finality doctrine a "practical rather than a technical construction," properly treated the District Court's order as functionally the denial of intervention.

Both the letter and overriding practical effect of the District Court's order establish that it was in fact a denial of intervention, properly appealable under § 1291. First, the District Court left no doubt as to its disposition of respondents' claimed right to intervene. In its 19-page order, the Court devoted fully 15 pages to its denial of respondents' application, reiterating at least five times its holding that respondents are not entitled to intervene as of right, either pursuant to the environmental statutes underlying the action or pursuant to Fed. R. Civ. P. 24(a)(2). *Id.* at A4, A14, A15, A16, A18. In reaching that unequivocal conclusion, the District Court relied on its finding that respondents' interests would not be impaired by the denial of intervention because the original parties could adequately represent those interests — a finding subsequently reversed by the unanimous panel of the Court of Appeals. Pet. Supp. App. A16-A20.

Second, although the District Court concluded its order with a discretionary grant of permissive intervention, it imposed limitations so stringent as to preclude any meaningful participation by respondents in this litigation. Depriving respondents of the most basic substantive and procedural rights traditionally deemed essential to a party's ability to protect its interests, the District Court denied them the right even to file motions or initiate discovery without first meeting with all of the 30 other parties to the

case and obtaining the permission of at least one of them — despite the fact, as the Court of Appeals recognized (*id.* at A17-A19), that each such party has interests adverse to those of respondents. Moreover, the District Court flatly prohibited respondents from filing any independent claims, however relevant or necessary to protect their interests, and instead limited their participation solely to the claims asserted by the original parties. In effect, therefore, while nominally granting respondents the status of a "party," the District Court simultaneously withdrew the very rights that enable meaningful participation in that capacity — rights nonetheless fully available to each of the other parties to the action.[10]

As the Court of Appeals recognized, the inevitable impact of these disabling restrictions is to prevent respondents from achieving the essential objectives for which intervention was sought. Pet. Supp. App. A11 n.4.

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[10] Thus, contrary to the United States' contention, respondents are clearly *not* in "the same position as any other party who has had one or more claims dismissed or who has been denied the right to engage in unlimited discovery." Brief for the United States as Respondent Supporting Petitioners ("U.S. Br."), at 20. An order that effectively precludes respondents from filing a motion, conducting any discovery, or asserting any claims goes far beyond either example posited by the United States, because, while any other party may ultimately be denied certain discovery or substantive relief upon application to the court, respondents cannot even apply. Thus, far from seeking any special right to file interlocutory appeals from nonappealable judicial orders, respondents have sought only the most basic rights essential to a party's protection of its interests.

Moreover, the United States' assertion that the "court of appeals plainly did not believe that the reimposition of these conditions on respondents would amount to a denial of the right to intervene" (U.S. Br., at 29) is simply incorrect. In fact, the Court of Appeals "express[ed] no view as to what conditions, if any, may appropriately be placed upon [respondents'] participation in the litigation in their capacity as intervenors as of right, or upon the participation of any other parties to the litigation." Pet. App. A2.

Petitioners' attempt nonetheless to portray the District Court's order as a "grant" of intervention totally ignores the reality that, by conditioning intervention so totally on the consent of adverse parties, the District Court virtually ensured that respondents will have no more impact in this action than they had for years in their unsuccessful attempts to persuade petitioners to abate the hazards at Stringfellow. Petitioners have not cited even one other case in which the rights of an intervenor — or, for that matter, the rights of any party — have been so thoroughly restricted.[11] Under these circumstances, the Court of

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[11] None of the cases cited by the United States (U.S. Br., at 24-26) involves conditions even remotely approximating the wideranging limitations imposed here, nor are the circumstances justifying those conditions at all analogous. This is not a case in which the conditions are derived from the underlying substantive statutes, *see, e.g., Trbovich v. United Mine Workers*, 404 U.S. 528, 531-33 (1972) (Labor-Management Reporting and Disclosure Act exclusive remedy); *Kirkland v. New York State Dep't of Correctional Serv.*, 711 F.2d 1117, 1126 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) (congressional policy favoring settlement and voluntary compliance under Title VII of the Civil Rights Act); *Southern v. Plumb Tools*, 696 F.2d 1321, 1322-23 (11th Cir. 1983) (state law evidentiary restrictions). Nor is this a case in which respondents unduly delayed seeking leave to intervene until the eve of trial, *see, e.g., Benson v. Little Rock Hilton Inn*, 87 F.R.D. 447, 449 (E.D. Ark. 1980); *Carroll v. American Fed. of Musicians*, 33 F.R.D. 353, 354 (S.D.N.Y. 1963), or until the remedial, settlement, or post-judgment stages, *see, e.g., Morgan v. McDonough*, 726 F.2d 11, 12 (1st Cir. 1984) (remedy phase); *Kirkland v. New York State Dep't of Correctional Serv.*, 711 F.2d at 1125 (settlement stage); *Spirt v. Teachers Ins. & Annuity Ass'n*, 93 F.R.D. 627, 637-38 (S.D.N.Y. 1982) (after judgment); *Shore v. Parklane Hosiery Co.*, 606 F.2d 354, 355 (2d Cir. 1979) (after settlement agreement entered into by original parties); *Associated Gen. Contractors v. Secretary of Commerce*, 459 F.Supp. 766, 770 (C.D. Cal. 1978), *vacated on other grounds*, 448 U.S. 908 (1980) (after judgment). Similarly, this case does not involve conditions necessary to prevent relitigation of matters already determined in prior proceedings, *see, e.g., Arizona v. California*, 460 U.S. 605, 615 (1983); *Newport News Shipbuilding & Drydock Co. v.*

Appeals' construction of the District Court's order as the effective *denial* of intervention — appealable under § 1291 — was eminently reasonable.

Third, petitioners' characterization of the District Court's order as a nonappealable "grant" of intervention would also eviscerate the distinction specifically drawn by Congress between intervention as of right under Fed. R. Civ. P. 24(a) and by permission under Rule 24(b). In contrast to permissive intervention, intervention as of right is not a matter committed to the court's discretion; by its very terms, it is a right to which the applicant is entitled

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Peninsula Shipbuilders' Ass'n, 646 F.2d 117, 122-23 (4th Cir. 1981); *Hall County Historical Soc'y v. Georgia Dep't of Transp.*, 447 F.Supp. 741, 746 (N.D. Ga. 1978); nor does it involve the unique circumstance in which conditions were imposed because the appearance of the insurer before the jury would prejudice the injured party's case, *see, e.g., Harris v. General Coach Works*, 37 F.R.D. 343, 346 (E.D. Mich. 1964), or a concededly permissive intervenor sought to expand significantly the scope of the litigation, *see, e.g., Van Hoomissen v. Xerox Corp.*, 497 F.2d 180, 181-82 (9th Cir. 1974). Finally, the remaining cases cited by the United States either do not actually impose any specific conditions or limitations, *see, e.g., Ross v. Bernhard*, 396 U.S. 531 (1970); *Ionian Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186 (2d Cir. 1970), or involve unique conditions imposed only in response to dilatory tactics and maneuvers by the intervenor, *see, e.g., United States v. Massachusetts Bonding & Ins. Co.*, 303 F.2d 823, 829 (2d Cir. 1962) (waiver of jury trial demand).

The United States' assertion that *Carroll v. American Fed. of Musicians, supra*, involved "conditions similar to those imposed by the district court in this case" (U.S. Br., at 26 n.22) is simply wrong. In fact, no limitations whatsoever were placed on intervenors' general right to file motions, raise objections, or otherwise assert and preserve their interests in matters before the court. Although the intervenors were denied additional discovery and were limited to the issues raised in the original pleadings, the court did so because the intervenors were represented by the same attorneys as the original plaintiffs and because their application to intervene was not filed until the eve of trial, two years after notes of issue were filed. 33 F.R.D. at 354. The instant case involves no such identity of counsel or delay.

upon a showing of sufficient interest, potential impairment of that interest, and lack of an adequate representative among the existing parties.[12] Because a denial of that right is a final adjudication of the applicant's statutory right to participate fully as a party and thereby to protect his or her interests in the action, the courts have consistently deemed such denials to be "final orders" within the meaning of § 1291, properly giving that term "a practical rather than a technical construction." If, as petitioners urge here, however, a concurrent grant of limited permissive intervention can negate the right to a prompt and timely appeal from such denials, the right to intervene would itself effectively be nullified. As the present case demonstrates, a court could improperly deny intervention as of right, yet prevent an appeal of that decision simply by nominally granting permissive intervention subject to any number of potentially disabling restrictions. The result is the worst of all worlds for the intervention applicant: Not only would that party wrongfully be denied both the right to intervene and the right that it concededly would otherwise have had to a timely appeal of that denial, but in the meantime it would be legally bound to any judgment subsequently entered in the case without having had the opportunity to protect its interest effectively due to the crippling conditions imposed on its participation. Such a result can be reconciled neither with the letter and spirit of Rule 24 nor with the ends of justice.[13]

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[12] *See* Fed. R. Civ. P. 24(a); *see also Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland*, ___ U.S. ___, 106 S.Ct. 3063, 3084-85 (1986) (Rehnquist, J., dissenting) (recognizing the "significantly different equitable concerns" raised by permissive intervention, as opposed to intervention as of right).

[13] Attempting to blur this distinction in Rule 24, the United States asserts that "the district court's denial of an applicant's petition to intervene as of right is of no moment" (U.S. Br., at 28), citing language of the Advisory Committee's Notes to Rule 24 suggesting that

Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co., 331 U.S. 519 (1947), fully supports the Court of Appeals' decision. Indeed, that case explicitly recognizes that where, as here, "a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying the intervention becomes appealable." *Id.* at 524.[14] Thus, it is the District Court's resolution of respondents' application for absolute intervention as of right, and not its ruling on discretionary permissive intervention, that determines appealability. Moreover, *Brotherhood* establishes that, in analyzing whether a denial of intervention is an

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intervention of right may be subject to appropriate conditions. *Id.* at 25-26. Professor Moore has noted, however, that "[i]t would be meaningless to give [the intervenor] an absolute right to intervene in order to protect his interest, if once in the proceeding he were barred from raising questions necessary for his own protection." 3B J. Moore, *Moore's Federal Practice* ¶ 24.16[4], at 24-178 (3d ed. 1985). *Accord Spangler v. United States*, 415 F.2d 1242, 1245 (9th Cir. 1969); *Park & Tilford v. Schulte*, 160 F.2d 984, 989 n.1 (2d Cir.), *cert. denied*, 332 U.S. 761 (1947); *see also* 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1922, at 507 ("It seems very doubtful, however, that the court has the right to make significant inroads on the standing of an intervenor of right . . . ."). In fact, all of the claims that respondents have sought to assert arise out of the same transaction as petitioners' claims and hence are in the nature of compulsory counterclaims, which *must* be asserted by a party — whether an original party or intervenor of right. Fed. R. Civ. P. 13(a). Rather than being subject to discretionary exclusion by the district court, "one who intervenes of right [and] wishes to assert a compulsory counterclaim . . . must be allowed to do so, and the cases so hold." 7C Wright, Miller & Kane, *supra*, § 1921, at 495; *see also* 3B Moore, *supra*, ¶ 24.17[2], at 24-187 ("If there is an absolute right to intervene the intervenor should be able to litigate the claim or defense for which he intervenes in all its ramifications, even though counterclaims or cross claims are involved therein.").

[14] The Court explained that appealability turns upon the "nature of the applicant's right to intervene. If the right is absolute, the order is appealable . . . . But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable . . . ." 331 U.S. at 524-25.

appealable order, the court's "jurisdiction is identified by the necessary incidents of the right to intervene in each particular instance." *Id.* at 525. In this case, where respondents' absolute right to intervene has unquestionably been denied, and where "the necessary incidents of the right to intervene" have been all but eviscerated by the District Court's order, the purely discretionary grant of nominal party status under Rule 24(b) should not be allowed to strip respondents' right to intervene of all significance by precluding an immediate appeal of its denial.[15]

Nor do the court of appeals decisions cited by petitioners contravene this analysis. Instead, they only illustrate its application under circumstances differing in precisely the respect at issue here — namely, that the courts considered in each case the "nature" and "incidents" of intervention necessary to a party's ability to protect its interests and, on that basis, concluded that the challenged intervention orders *granted* leave to intervene, notwithstanding the imposition of certain conditions.[16]

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[15] Eschewing the full analysis mandated by *Brotherhood*, petitioners would have this Court begin and end the inquiry regarding appealability with but one of the "incidents of the right to intervene" — the right to appeal from final judgment. Although the right to appeal is unquestionably an essential right of a party — as this Court indicated in *Brotherhood* — it is by no means the only "incident" of intervention as of right that need be considered in determining whether an applicant has effectively been denied his or her right to intervene. In some cases, an intervention order granting an intervenor no more than the right to appeal from final judgment will be inadequate to protect an applicant's interest, thus rendering the order an effective denial of intervention despite the right to an appeal. The instant appeal — arising out of an order that denies respondents the basic tools necessary even to make a record for an appeal from final judgment (*e.g.*, rights to initiate discovery, file motions, assert claims) — is just such a case.

[16] In *Shore v. Parklane Hosiery Co.*, 606 F.2d 354 (2d Cir. 1979), for example, the Second Circuit concluded that the conditions imposed did not constitute a denial of intervention because the applicants — former

In this case, by contrast, the focus of the District Court's order — and the ultimate effect of its decision — is the denial of respondents' intervention application. Regardless of whether the intervention is characterized as by right or by permission, the strictly circumscribed role accorded respondents is simply inadequate to protect their interests, and the Court of Appeals explicitly so held. Pet. Supp. App. A11 n.4. However sufficient the right to appeal from final judgment may be to protect the rights of an intervenor whose interest is pecuniary and hence fully compensable at the end of the case, it cannot adequately protect respondents' interest in preventing the threatened contamination of their communities, in an action that by definition arises out of, and seeks to remedy, an imminent hazard to their health and safety. *See, e.g., Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1239 (7th Cir. 1985), *cert. denied*, — U.S. —, 106 S.Ct. 1378 (1986) (interest in preventing toxic waste contamination of water supply and

members of the plaintiff class seeking to challenge a proposed settlement — were able adequately to protect their own interests; consequently, the order was held nonappealable. Similarly, in *Kartell v. Blue Shield of Massachusetts*, 687 F.2d 543 (1st Cir. 1982), the First Circuit dismissed an appeal from the district court's grant of limited intervention only after first satisfying itself that the conditions did not impair the intervenors' ability to protect their interests. The court noted pointedly that the intervention application, filed by the same organization that had originally financed the litigation, was in essence only the "functional equivalent" of an application to file an amended complaint, which is unquestionably a matter within the discretion of the trial court, appealable only after final judgment. *Id.* at 550-51. Finally, in *Wheeler v. American Home Products*, 582 F.2d 891 (5th Cir. 1977), following final judgment in the district court in a Title VII action, the court of appeals rejected the appellees' attempt to preclude any appellate review of the district court's intervention order. The only limitation imposed on the intervention had been the preclusion of the intervenors' claims for back pay.

resulting adverse health effects can be protected only by immediate appeal).[17]

Under these circumstances, the "necessary incidents" of intervention must enable respondents to protect their interests *now* rather than years hence — when the fate of their community will essentially have been decided and the right to appeal will at best have only theoretical importance. Because the District Court's order denies respondents the essential rights guaranteed by Rule 24(a) in order to protect their interests, the Court of Appeals properly adjudged it a denial of intervention, immediately appealable under 28 U.S.C. § 1291.

B. The District Court's Order Is An Immediately Appealable Collateral Order.

The District Court's denial of intervention as of right is immediately appealable as well because it falls within the "collateral order" exception established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In *Cohen*, this Court concluded that the purposes of the final judgment rule were best served by allowing an immediate

[17] Totally apart from the conceded risk of adverse health consequences to respondents, the Court of Appeals recognized that the disposition of this action, whether through settlement or trial, will for all practical purposes establish the remedial program to be implemented at the Stringfellow site. Pet. Supp. App. A15. The exact form, timing, and breadth of the clean-up; the impact of the remedial program on respondents' health and ability to reside in their homes; the extent of the work program's intrusion into their daily lives; the provisions that are included for monitoring and enforcing the remedy once the lawsuit is concluded; and the future liabilities and responsibilities of the existing parties for unforeseen discoveries and events during the course of the clean-up — all of these issues are of vital concern to respondents, and all of them will be decided in the context of this action.

appeal from an order holding inapplicable in a federal diversity action a state statute requiring the plaintiff shareholders to post a bond as security for the defendant corporation's litigation expenses. Seeking to give § 1291 a practical reading, the Court explained that the decision was one of a "small class" of orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546 (citations omitted).[18]

Although representing only a "narrow exception to the requirement that all appeals under § 1291 await final judgment," *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981), *Cohen* and its progeny have never been understood to lay down a rigid test for finality.[19] Rather,

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[18] More recent applications of this "collateral order doctrine" have restated *Cohen's* formulation to require that the order "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *see also Mitchell v. Forsyth*, ___ U.S. ___, 105 S.Ct. 2806, 2816 (1985); *Richardson-Merrell, Inc. v. Koller*, ___ U.S. ___, 105 S.Ct. 2757, 2761 (1985); *United States v. MacDonald*, 435 U.S. 850, 854-55 (1978); *Abney v. United States*, 431 U.S. 651, 658-59 (1977).

[19] Indeed, a number of this Court's decisions allowing appeals before final judgment defy precise application of the three-part *Cohen* test. *See, e.g., American Export Lines v. Alvez*, 446 U.S. 274, 277-78 (1980) (order denying leave to amend complaint); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-54 (1964) (order striking wrongful death claims); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 557-58 (1963) (order denying claim of improper venue); *Local No. 438 Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 548-50 (1963) (Georgia Supreme Court order granting temporary restraining order); *Brown Shoe Co. v. United States*, 370 U.S. 294, 305-11 (1962) (divestiture order); *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 382-83 (1953) (order denying demurrer held final under § 1257); *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72-74 (1946) (order granting new trial). *Cf. Bradley v. School Bd.*, 416 U.S. 696, 722-23 n.28 (1974) (suggesting based on § 1291 that interim school desegregation order that "determines substantial rights of parties" may be final for purposes of fee award). *See generally Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-79 (1975).

the inquiry under the collateral order doctrine must focus on whether allowing an appeal is consistent with the purposes of the final judgment rule, and each prong of the three-part *Cohen* test should be interpreted in light of those purposes. Stated more succinctly, the *Cohen* test looks essentially to "whether the right affected by the ruling can and should be protected by appeal prior to judgment." *Richardson-Merrell, Inc., v. Koller*, ___ U.S. at ___, 105 S.Ct. 2757, 2764 (1985).

1. The District Court's Intervention Order Conclusively Determines the Question of Respondents' Intervention In This Action.

The *Cohen* test's first prong — that the order "must conclusively determine the disputed question" — ensures that the decision is ripe for review and promotes "the efficient administration of justice" by precluding appellate review until the trial court has had an opportunity to complete its consideration of the matter. *Flanagan v. United States*, 465 U.S. 259, 264-65 (1984). In this case, there can be no doubt that the District Court's decision "constitute[s] a complete, formal, and, in the trial court, final rejection" of respondents' claimed right to intervene. *Abney v. United States*, 431 U.S. 651, 659 (1977). The District Court's denial of respondents' claimed right was by no means preliminary or tentative, and "there is no basis to suppose that the District Judge contemplated any reconsideration of his decision." *Moses H. Cone Memorial*

Hospital v. Mercury Construction Corp., 460 U.S. 1, 12-13 (1983). In contrast to the order on class certification considered in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) — an order that "may be 'altered or amended before the decision on the merits' " and is "inherently tentative" (*id.* at 469 n.11 (quoting Fed. R. Civ. P. 23(c)(1))) — a denial of intervention of right is not an order "as to which some revision might reasonably be expected in the ordinary course of litigation." *Moses H. Cone Memorial Hospital*, 460 U.S. at 12 n.14.[20] Rather, it is a legal determination outside the discretion of the trial court, to be judged on the basis of specific legal standards and, in applying those standards to established facts, reviewed *de novo* by the appellate court. *See* Pet. Supp. App. A12. As in *Cohen*, the trial court's order applying statutory standards in adjudicating respondents' right to intervene was "concluded and closed and . . . final" (337 U.S. at 546), and thus the order has "conclusively determine[d] the disputed question." *Coopers & Lybrand*, 437 U.S. at 468.

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[20] In *Moses H. Cone Memorial Hospital*, 460 U.S. at 12-13, this Court considered and flatly rejected a claim that, because the stay order there in issue could conceivably be reconsidered by the trial court, such order did not meet the *Cohen* requirement of a "conclusive determin[ation]":

> [V]irtually all interlocutory orders may be altered or amended before final judgment if sufficient cause is shown; yet that does not make all pretrial orders "inherently tentative" in the sense of that phrase in *Coopers & Lybrand*. The rationale behind Rule 23(c)(1) is that a certification decision should be made "[a]s soon as practicable," even though later events or discoveries may mandate a different result. Many other orders, by contrast, are made with the expectation that they will be the final word on the subject addressed.

Id. at 12 n.14. See also 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 788-92 (2d ed. 1981).

2. The District Court's Intervention Order Resolves An Important Issue Completely Separate From the Merits of the Action.

The collateral order doctrine's second prong — that the order resolve an issue collateral to the merits of the action — seeks to prevent premature consideration of issues that "may fairly be assessed" only after trial, *United States v. MacDonald*, 435 U.S. 850, 860 (1978), and those involving "considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Coopers & Lybrand*, 437 U.S. at 469 (quoting *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963)); *see also Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. at 377. If an order relates to a collateral matter, there is much less chance that subsequent developments at trial will cast new light on the matter and prompt its reconsideration. As stated in *Cohen*, the order must "not make any step toward final disposition of the merits of the case and [must] not be merged in final judgment." 337 U.S. at 546.

The issue of respondents' right to intervene is certainly "separable" from, and "collateral" to, the merits in this case. Respondents' application in no way calls for an advance ruling on the merits, nor can the Court's order fairly be characterized as making any step toward final disposition of the action. To the contrary, respondents requested only a determination of their rights under statutory intervention criteria that stand entirely apart from the substantive elements that make up plaintiffs' claims on the merits. With respect to intervention under Rule 24(a)(1) and the CWA, RCRA, and the SDWA, for example, the inquiry for purposes of intervention is simply whether, as a legal matter, the statute "confers an unconditional right to intervene." Fed. R. Civ. P. 24(a)(1). With respect to the more general intervention standards under Rule 24(a)(2) —

relied upon by the Court of Appeals below — the essential inquiry encompasses (1) timeliness of the application; (2) interest of the applicant; (3) potential impairment of that interest; and (4) inadequacy of representation. As to "timeliness" and "interest," there is clearly no dependency on the merits, and, indeed, in this case both issues were never even disputed by petitioners. Pet. Supp. App. A13. Similarly, both the Rule's "impairment of interest" and its "adequacy of representation" criteria require a showing only of *potential* impairment or inadequacy, rather than impairment or inadequacy *in fact*.[21] Thus, none of the Rule 24(a) criteria requires or contemplates consideration of the merits as a precondition to ruling on an application for intervention as of right, nor would disposition of the merits in any way facilitate such a determination.

Moreover, neither the District Court nor the Court of Appeals suggested that respondents' intervention application in this case hinged in any way on the ultimate disposition of the merits. Because the standards for intervention can be judged by the application of legal standards to facts unrelated to the evidence ultimately presented at trial, the correctness of their decisions on intervention will not be affected by anything that might occur during the remaining trial proceedings.[22] Conse-

[21] By its terms, Rule 24(a)(2) requires only that disposition of the action "*may* as a practical matter impair or impede" respondents' interests (emphasis added); likewise, inadequacy of representation is established where an applicant "shows that representation of his interest '*may* be' inadequate." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (emphasis added). *Accord Smith v. Pangilinan*, 651 F.2d 1320, 1325 (9th Cir. 1981); *Legal Aid Soc'y v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980). *See also Nuesse v. Camp*, 385 F.2d 694, 702-03 (D.C. Cir. 1967); 7C Wright, Miller & Kane, *supra*, § 1909, at 312-17; Pet. Supp. App. A16-A17.

[22] These circumstances clearly differ from those considered in *Richardson-Merrell, Inc. v. Koller*, — U.S. —, 105 S.Ct. 2757, 2765 (1985), cited repeatedly by petitioners. There, the Court concluded that an order disqualifying counsel would be "inextricably tied up in the merits" if a violation of the right to representation required a showing of prejudice — a showing that could not be made until after trial on the merits. Here, by contrast, the standards for intervention require only a determination of strictly legal questions or a showing of potential prejudice or impairment based on facts known at the time the intervention application is filed. As such, this case is analogous to *Mitchell v. Forsyth*, — U.S. —, 105 S.Ct. 2806, 2816 (1985), where the Court concluded that the determination of qualified immunity there in issue was "conceptually distinct from the merits of the plaintiff's claim," even though a reviewing court must consider the plaintiff's factual allegations in resolving the legal issue in question.

quently, the intervention decision at issue here is unquestionably "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974) (quoting *Cohen*, 337 U.S. at 546-47). Accordingly, it satisfies the second prong of the *Cohen* formulation.

3. The District Court's Order Is Effectively Unreviewable on Appeal From Final Judgment.

Finally, the third of the "collateral order" criteria — that the order must "be effectively unreviewable on appeal from a final judgment" (*Coopers & Lybrand*, 437 U.S. at 468) — ensures that there is a practical reason for allowing an appeal before entry of final judgment by looking to whether "the right affected by the ruling can and should be protected by appeal prior to judgment." *Richardson-Merrell*, — U.S. at —, 105 S.Ct. at 2764. Stated another way, the third prong requires that "the danger of denying justice by delay" outweigh "the inconvenience and costs of piecemeal review." *Gillespie v. United States Steel Corp.*, 379 U.S. at 152-53.

Applied to this case, these standards dictate that an immediate appeal be permitted. This lawsuit is, by definition, one in which "time is of the essence." As an "imminent hazard" action initiated in order to abate the immediate dangers of contamination and the resulting harm to respondents' health and safety, it differs materially from other cases in which this Court has found the availability of review after final judgment adequate to protect the appellant's interests. Unlike the interests ultimately at stake in those actions — interests not irrevocably lost as a result of the delay necessarily attendant to review after final judgment — the imminence of the hazard at Stringfellow renders an immediate appeal essential if respondents' right to intervene is to have any practical value in protecting their "direct and substantial" interests in this case. Pet. App. A15. A plume of toxic chemicals from the site is steadily seeping into the groundwater supplies of the surrounding communities, necessitating urgent clean-up measures. As the Court of Appeals acknowledged, from both a scientific and a practical standpoint, the clean-up remedy established by the resolution of this action (whether through trial or settlement) will essentially *be* the clean-up program implemented for the Stringfellow site, and it will preclude the adoption of any other remedial options that might subsequently be proven necessary. *Id.*[23] At that point, the

[23] One example is illustrative: For years, respondents have criticized the governments' interim remedial measures for focusing their entire efforts at *containing* the further spread of contaminants downstream from the Stringfellow site, while making no attempt simultaneously to *remove* the source of the deadly toxins from the Acid Pits themselves. If the governments persist in following this same strategy in their permanent remedial program (as appears most probable given the lower cost of this containment option compared to any removal strategy), then by the time respondents could subsequently challenge the remedy adopted as a result of this litigation, the contaminants may well have become so diffused that removal would be technically impossible. *See generally* Trezek, *Engineering Case Study of the Stringfellow Superfund Site* (Congressional Office of Technology Assessment, August 1984).

right to appeal the denial of intervention might be of little more than academic interest, for the outcome of this action would for all practical purposes have been conclusively and irrevocably determined. Construing the finality requirement, therefore, "so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered" (*Firestone Tire & Rubber*, 449 U.S. at 376), the intervention order at issue in this case plainly bears the requisites of finality sufficient to justify its immediate appeal. *See Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d at 1239 n.3.[24]

Moreover, it is distinctly likely that entry of final judgment in this case would be deferred for years, until after extensive remedial activities have been undertaken pursuant to interim court orders or to a settlement agreement among the original parties. Due to the complexity of the toxic waste clean-up process and the resulting uncertainties regarding the range of potential remedial measures, the court or original parties might well adopt a remedial scheme (on an interim or final basis) that contemplates an extended period for study, design, and implementation, deferring any final judgment and dismissal of the action until greater certainty exists regarding the actual efficacy of the plan and its cost. Similarly, were the original parties to agree to hold further litigation in abeyance pending completion of some or all of the actual

[24] Even if respondents were able to relitigate the critical clean-up question effectively following an appeal from final judgment in the lower court, they would be forced to do so only at the risk of delaying the relief that had been ordered or agreed upon. The benefits to be gained from avoiding piecemeal appeals are patently insufficient to impose upon respondents such a Hobson's choice on an issue so critical to their health and safety.

clean-up process — as has, in fact, recently been proposed — substantial remedial activities might take place before any final resolution of this action were reached. In either event, if appeal were not permitted until after entry of final judgment, respondents would be left without recourse to protect their interests, for the debilitating conditions imposed by the District Court would prevent them from investigating the effectiveness of the remedial program through discovery or from challenging any of the program's inadequacies by suitable motion to the Court. This predicament — unique to the intervention context — highlights both the practical finality of the District Court's order and the attendant necessity for an immediate appeal.

No matter when final judgment is ultimately entered, however, the unprecedented restrictions imposed on respondents' participation will render the District Court's intervention order essentially unreviewable on post-judgment appeal. In contrast to the interlocutory orders previously considered by this Court, the District Court's order here not only precludes respondents from protecting their interests in a timely way but prevents them from even making the very record necessary to establish on appeal the prejudicial effects of the trial court's actions.[25] This is not a case where disqualified counsel are replaced by other counsel, who can then provide full representation prior to an appeal after final judgment of the disqualification order (*Richardson-Merrell*, — U.S. at —, 105 S.Ct. at 2763); nor is it a case in which a party denied class certification can fully assert its individual rights prior to appeal of the class

[25] The requirement that all issues be raised and properly preserved in the trial forum is fundamental to meaningful appellate review and "essential" to the orderly and efficient operation of the judicial process. *See, e.g., Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Johnston v. Reily*, 160 F.2d 249, 250 (D.C. Cir. 1947).

certification order after final judgment (*Coopers & Lybrand*, 437 U.S. at 469). Rather, the District Court's imposition in this case of virtually insurmountable obstacles to the exercise of even the most basic rights of participation has, for all practical purposes, both terminated respondents' role in this action and foreclosed any effective challenge to the Court's order at the conclusion of trial.[26] For without the ability to initiate discovery or file motions except through the sufferance of adverse parties, respondents can neither obtain the judicial relief necessary to protect their interests during the pendency of the trial court proceedings nor establish the record universally required for prosecution of a successful appeal after entry of final judgment. Thus, both independently and in combination, the effect of the limitations imposed on respondents renders the very order in which those limitations were established effectively unreviewable after final judgment.[27]

[26] Consequently, the "appropriate guiding principle" suggested by the United States — namely, that once admitted as a party, an intervenor is bound by the same limits on appealability as any other party (U.S. Br., at 29) — is simply inapplicable in these circumstances. However appealing such a "bright line" test might appear in the normal case, it has no utility where, as here, respondents possess none of the basic rights enjoyed by any other party. Under the United States' proposed "guiding principle," an order "granting" intervention but limiting the intervenor's participation solely to the right of appeal after final judgment would not be immediately appealable even though the intervenor could do no more than observe the trial court proceedings. U.S. Br., at 29. Yet such an order would surely be deemed final and appealable under § 1291.

[27] Even the United States seems to recognize the effective unreviewability of the denial of respondents' right to intervene. In contending that the only issue for appeal after final judgment will be the reasonableness of the conditions imposed by the District Court and not its denial of respondents' right under Rule 24(a) (U.S. Br., at 28-29), the United States implicitly acknowledges that the statutory entitlement will then essentially have been eviscerated. If indeed the government is correct that the appellate court's inquiry will focus solely on the prejudice suffered by respondents as a result of their limited

Faced with these circumstances, petitioners' conclusory references to the costs of piecemeal review simply do not warrant denial of immediate appeal — particularly since no stay of the District Court proceedings has been imposed during the pendency of this appeal and respondents have made "no effort to interrupt or delay [the] proceedings." *Richardson v. United States*, 468 U.S. 317, 322 (1984). Although petitioners characterize this case as "perhaps a perfect example of the unreasonable disruption, delay and expense that interlocutory appeals impose upon the parties and the courts" (Pet. Br., at 18), they fail to provide even one illustration of how respondents' appeal of the intervention denial has in any way delayed or disrupted the District Court proceedings. Contrary to petitioners' assertion that respondents' appeal has "needlessly detracted from efforts to bring the underlying district court action to a final resolution" (*id.*), the litigation below has continued without interruption through discovery, pretrial motions,

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participation, then the issue of respondents' legal entitlement to full intervention status will be a matter only of theoretical interest. *Cf. State of California v. Block*, 690 F.2d 753, 776 (9th Cir. 1982) (requiring demonstration of "specific injury" in challenge to denial of intervention of right on appeal from final judgment). Obviously, requiring an applicant to demonstrate prejudice "after the fact" is a very different inquiry than that contemplated by Rule 24(a) and the environmental statutes upon which this action rests. Thus, postponing appellate review threatens to undermine substantially the right to intervene guaranteed by Congress.

Moreover, "delaying appellate review until after final judgment would adversely affect the court of appeals' ability fairly to evaluate the propriety of the district court's order." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). As in *Carson*, because intervention as of right is determined on the basis of statutory standards applied to the facts at the time the application is made, "appellate review would be more effective if held prior to the trial court's factfinding rather than after final judgment when the rights and liabilities of the parties have been established." *Id.*

and settlement negotiations.[28] Conversely, petitioners completely ignore the significant "mischief of economic waste and of delayed justice" that would result from having to reopen the merits following reversal of the District Court's intervention order after final judgment. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-78 (1975) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). Thus, far from creating a situation in which "the result of review will be 'to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation,' " *Cobbledick v. United States*, 309 U.S. 323, 326 (1940) (quoting *Segurola v. United States*, 275 U.S. 106, 112 (1927)), the Court of Appeals' decision is fully consistent with recognized interests in judicial economy and efficiency.

In sum, petitioners' unsupported invocation of the "costs of piecemeal review" cannot outweigh the very real "danger of denying justice by delay" in this case. *Gillespie*, 379 U.S. at 152-53. The District Court's intervention order involves "an important right which would be 'lost, probably

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[28] These circumstances distinguish this case from *Richardson-Merrell* and *Flanagan*. In both of those cases, the Court noted the delay that inherently accompanies interlocutory appeal of an order disqualifying counsel, either because the trial court proceedings may be stayed or because "it would take an intrepid district judge to proceed to trial with alternate counsel while her decision disqualifying an attorney is being examined in the Court of Appeals." *Richardson-Merrell*, ___ U.S. at ___, 105 S.Ct. at 2763; *see also Flanagan*, 465 U.S. at 264. In addition, these cases involved a type of order whose increasing tactical use for harassment purposes posed a risk of significantly burdening the appellate courts with piecemeal appeals. *Richardson-Merrell*, ___ U.S. at ___, 105 S.Ct. at 2764. Here, by contrast, no similar risk has been shown. Indeed, more than any other party to this action, respondents have an interest in the prompt resolution of this action and the full clean-up of the Stringfellow Acid Pits, an interest demonstrated through years of frustrated attempts to compel the responsible parties — including petitioners — to abate the releases of toxic chemicals from the dumpsite.

irreparably,' if review had to await final judgment." *Abney*, 431 U.S. at 658 (quoting *Cohen*, 337 U.S. at 546). Accordingly, in order to preserve respondents' right to intervene, their right to a timely appeal, and their right to meaningful participation in the action that may determine the very fate of their community, the Court of Appeals' judgment allowing respondents' immediate appeal from the District Court's intervention order should be affirmed.

II. THE DISTRICT COURT'S INTERVENTION ORDER IS IMMEDIATELY APPEALABLE UNDER 28 U.S.C. § 1292(a)(1).

One of the categorical exceptions created by Congress to § 1291's general rule of finality is contained in 28 U.S.C. § 1292(a)(1), which authorizes immediate appeal from "[i]nterlocutory orders . . . refusing . . . injunctions." (The full text of § 1292(a)(1) is reproduced in the Appendix hereto.) As this Court explained in *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181 (1955), this statutory exception arose out of "a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence." *Accord Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981). The District Court's intervention order — whether it is technically deemed "final" or "interlocutory" — fits squarely within the language and rationale of § 1292(a)(1), because the order prevents respondents from obtaining the injunctive relief they requested, and because postponing appellate review until after final judgment will cause them serious, if not irreparable, harm.[29]

[29] Since the Court of Appeals determined that it had jurisdiction to review the District Court's intervention order under § 1291, it had no occasion to address the question of appealability under § 1292(a)(1).

A. The District Court's Intervention Order Effectively Denies The Injunctive Relief Sought by Respondents.

For an interlocutory order to be appealable under § 1292(a)(1), it need not by its terms "refuse an injunction." Rather, the order must only have the "practical effect" of doing so. *Carson*, 450 U.S. at 83-84. Thus, for example, in *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S. 430 (1932), an interlocutory order dismissing the defendants' counterclaim was held to be appealable under § 1292(a)(2)'s predecessor, § 129 of the Judicial Code. Although the defendants had not applied for an injunction and the District Court's order did not technically constitute the refusal of an injunction, this Court held the order reviewable because dismissal of the defendants' counterclaim effectively denied them the protection of the injunction prayed for in their answer. *Id.* at 433.[30] Similarly, in the instant case, the limitations placed by the District

However, respondents specifically relied upon the latter provision as an alternative jurisdictional basis in the court below (*see* Appellants' Memorandum in Opposition to Motion to Dismiss Appeal (March 23, 1984), at 18-23), and, as the prevailing party, they are entitled in this Court to advance any ground in support of the judgment in their favor. *See, e.g., Trans World Airlines v. Thurston*, ___ U.S. ___, 105 S.Ct. 613, 620-21 n.14 (1985); *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

[30] *Accord Enelow v. New York Life Ins. Co.*, 293 U.S. 379, 381-83 (1935) (order by court of equity granting or refusing stay of proceedings at law deemed to be grant or refusal of an injunction within the meaning of § 129 of the Judicial Code); *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188, 191-92 (1942) (similar holding based on rationale that "the statute looks to the substantial effect of the order made"); *Carson*, 450 U.S. at 83-84 (order refusing to approve consent decree containing substantial prospective injunctive relief held to have practical effect of refusing an injunction).

Court upon respondents' intervention effectively denied them the injunctive relief they sought in their Complaint-in-Intervention, thereby "refusing an injunction" within the meaning of § 1292(a)(1).

Three aspects of the District Court's order are particularly relevant in this regard. First, in denying respondents absolute intervention as of right under Rule 24(a) and instead granting them only a limited permissive intervention under Rule 24(b), the District Court narrowly circumscribed the claims for relief that respondents could assert in this action.[31] In particular, the District Court prohibited respondents from pursuing the additional injunctive relief they had sought against both the plaintiffs and the defendants: Whereas the government plaintiffs' complaint sought only to abate the releases and threatened releases of hazardous substances at the site (subject to approval of the governmental agencies) and to remedy those conditions presenting an "imminent and substantial endangerment," respondents' Complaint-in-Intervention requested additional injunctive relief both broader in scope

[31] The District Court broadly ruled that respondents could assert no claim that had not already been asserted by the original parties, nor any claim "with a question of law or fact in common with the Second, Fifth, Seventh and Eighth [the cost-recovery] claims of the First Amended Complaint." Pet. App. A19- A20. At a minimum, the order precludes respondents from pursuing any of the additional claims included in their proposed Complaint-in-Intervention. Although petitioners have sought to characterize these excluded causes of action as claims for "damages," six of the seven claims in fact support respondents' prayer for injunctive relief, and some of these claims may provide the strongest legal bases for the additional injunctive relief requested in the Complaint-in-Intervention. As respondents repeatedly made clear in the courts below, their primary interest has always been to ensure a complete and expeditious clean-up of the Stringfellow site; personal injury and property damage claims were asserted (on behalf of the single named intervenor) only to preserve and protect them from possible waiver under procedural rules of merger and bar.

and different in kind than that sought by the governments.[32] By restricting respondents to the claims asserted by the original parties, the District Court not only effectively "refused" the broader injunction that respondents had requested, but it precluded them from pursuing the very relief that had occasioned their intervention application in the first place. Courts have consistently found such orders striking an intervenor's claims for additional injunctive relief to be appealable under § 1292(a)(1).[33] In

[32] Specifically, respondents sought (a) to remedy permanently the conditions which may present or contribute to *any* endangerment or hazard to the public health, welfare and the environment, not just to an "imminent and substantial" endangerment; (b) to remove all hazardous substances and contaminants from the site and surrounding areas; and (c) to establish an independent program for health studies and medical screening of the community residents. *See* Pet. Supp. App. A8.

[33] *See, e.g., Spangler v. United States*, 415 F.2d 1242, 1246-47 (9th Cir. 1969); *Stewart-Warner Corp. v. Westinghouse Elec. Corp.*, 325 F.2d 822, 826 (2d Cir. 1963), *cert. denied*, 376 U.S. 944 (1964); *Switzer Bros. v. Locklin*, 207 F.2d 483, 484-86 (7th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954). *See also Van Hoomissen v. Xerox Corp.*, 497 F.2d 180, 183 (9th Cir. 1974) ("a denial of intervention as a matter of right is effectively a denial of injunctive relief where there is an appropriate prayer"); *Kartell v. Blue Shield of Mass., Inc.*, 687 F.2d 543, 551-52 & n.17 (1st Cir. 1982). In *Spangler*, for example, the United States moved to intervene as of right, joining the plaintiffs' claims but seeking broader injunctive relief. The district court's order granting intervention, but limiting the United States to the relief sought by the plaintiffs, was held appealable under § 1292 because, as a practical matter, it denied the government's request for an injunction. *Accord Switzer Bros. Inc. v. Locklin*, 207 F.2d at 484-86 (order allowing intervention but denying leave to file related counterclaim seeking injunction held appealable). *Spangler* accepted the distinction drawn by Judge Friendly's dissent in *Stewart-Warner* between a "refusal" based on an allegedly erroneous legal conclusion and a "refusal" based on an alleged abuse of discretionary power over the scope of the action. *See Stewart-Warner*, 325 F.2d at 828-29 (Friendly, J., dissenting). As is true here, however, the court in *Spangler* determined that the order limiting the available relief was more than a discretionary order controlling the litigation, because it rested on the erroneous legal conclusion that the intervenor

fact, the District Court's order would be appealable under § 1292(a)(1) even if respondents had not sought broader injunctive relief, for it precludes them from asserting distinct legal theories supporting their prayer for an injunction.[34]

Second, the District Court's intervention order restricts respondents' ability to obtain complete injunctive relief by limiting the parties against whom such relief may be pursued. In their proposed Complaint-in-Intervention, respondents prayed for an injunction not only against the original defendants, but against the United States Air Force, the California Department of Health Services, and the California Water Resources Control Board. Each of these governmental agencies allegedly caused or contributed to the hazardous conditions at the Stringfellow site, yet none of them was sued by the plaintiffs; likewise, none of the defendants' counterclaims seek affirmative injunctive relief against these agencies (as opposed to counterclaims for contribution and indemnity, which defendants have subsequently asserted). By limiting respondents' intervention to the claims asserted by the original parties, the District Court thus effectively dismissed all of respondents' claims (including the claims for injunctive relief) against these governmental agencies. In so doing, the Court may well have foreclosed any possibility that respondents can obtain the full injunctive relief they have sought.[35] Again,

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had no right to inject additional claims into the litigation. 415 F.2d at 1247.

[34] *See generally United States v. New York, N.H. & H. R. Co.*, 276 F.2d 525, 545-46 (2d Cir.), *cert. denied sub nom. Tri-Continental Financial Corp. v. Glenmore*, 362 U.S. 964 (1960); *id.* at 553-57 (on denial of application for hearing *en banc*) (opinion of Friendly, J.); *Telechron, Inc. v. Parissi*, 197 F.2d 757, 759-60 (2d Cir. 1952).

[35] For certain portions of respondents' requested injunction, such as the demand for medical testing and screening, the governmental agencies (particularly the State Department of Health Services) may be

such orders limiting the availability of complete injunctive relief are consistently held to be appealable under § 1292(a)(1).[36]

Finally, and perhaps most important, the unprecedented motions and discovery restrictions imposed by the District Court upon respondents' right to litigate even those claims they have been allowed to assert, have effectively denied respondents the opportunity to obtain the injunctive relief sought in their Complaint-in-Intervention. Without the independent right to initiate discovery or motions, respondents would be precluded from even *requesting*, much less securing, any preliminary injunctive relief, although in this "imminent hazard" action, the ability to

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the only parties capable of providing the relief. Moreover, if it were ultimately determined — as defendants vigorously contend — that the government agencies were solely responsible for creating the hazardous conditions in and around the Stringfellow site (or even some discrete portion thereof), they would be the only parties against whom injunctive relief could be obtained. Yet the District Court's order prohibits respondents from even asserting claims against them.

[36] *See, e.g., Presinzano v. Hoffman-La Roche, Inc.*, 726 F.2d 105, 109 (3d Cir. 1984) (summary judgment order dismissing claims against only defendants against whom injunction had been requested held appealable); *Tagupa v. East-West Center, Inc.*, 642 F.2d 1127, 1129 (9th Cir. 1981) (dismissal of claims forming basis for injunctive relief against one of defendants held appealable because it had substantial effect of refusing injunction); *Davis v. Ball Memorial Hosp. Ass'n*, 640 F.2d 30, 34-35 (7th Cir. 1980) (order dismissing governmental defendant from lawsuit appealable where requested injunctive relief calls for substantial involvement of that defendant); *Holton v. Crozer-Chester Med. Ctr.*, 560 F.2d 575, 577-78 (3d Cir. 1977) (appeal lies where dismissal of some defendants prevents plaintiff from obtaining full injunctive relief requested); *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 73 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976) (order dismissing only parties against whom injunctive relief is sought is appealable); *Build of Buffalo, Inc. v. Sedita*, 441 F.2d 284, 286-87 (2d Cir. 1971) (dismissal of some, but not all, defendants is appealable if it reduces scope of injunctive relief available).

apply for and obtain relief *pendente lite* is critical.[37] Respondents' proposed complaint repeatedly emphasizes the need for — and their consequent demand for — urgent action to abate the toxic releases that threaten their community. Of all the parties to this case, only respondents are directly affected on a daily basis by the life-endangering conditions at the site and by the inexorable flow of the plume of contaminants. Yet perversely, under the District Court's order, it is respondents alone who are precluded from seeking any interim relief that might prove necessary to protect their health and safety.[38] Because such orders "refusing" preliminary injunctive relief require prompt appellate review if any review is to be effective, they have uniformly been deemed appealable under § 1292(a)(1). *See, e.g., Honig v. Students of Calif. Sch. for the Blind*, __ U.S. __, 105 S.Ct. 1820, 1821 (1985) (*per curiam*); *Davis v. Ball Memorial Hospital Ass'n*, 640 F.2d 30, 35 (7th Cir. 1980); *Shirey v. Bensalem Township*, 663 F.2d 472, 475-76 (3d Cir. 1981).

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[37] For that matter, without the ability to file any motions, respondents would be unable to seek and obtain the Court's consideration of any request for injunctive relief — whether preliminary or permanent — other than that sought by the original parties.

[38] Ironically, this Court's review of the Court of Appeals' decision granting respondents the status of intervenors as of right coincides with the beginning of that phase of the litigation in which the need to make motions or to seek injunctive relief is likely to be most acute. The preliminary investigation of remedial options for the Stringfellow site is expected to be completed later this year, at which time it should be possible to begin implementation of substantial interim remedial measures. Under the District Court's order, however, respondents would be virtually powerless to request their own measures or to object to any aspect of the interim program agreed to by the original parties, no matter how great the harm might be to their community.

B. The District Court's Intervention Order May Have "Serious, Perhaps Irreparable, Consequences" and Can Be "Effectually Challenged" Only By Immediate Appeal.

In *Carson v. American Brands, Inc., supra*, this Court explained that not every order that has the practical effect of refusing an injunction is immediately appealable under § 1292(a)(1): "Unless a litigant can show that an interlocutory order of the district court might have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal." 450 U.S. at 84 (quoting *Baltimore Contractors*, 348 U.S. at 181). The District Court's intervention order in this case plainly satisfies this standard.

In *Carson*, the parties had jointly moved for entry of a proposed consent decree requiring the defendant employer to give hiring and seniority preferences to black employees. The District Court refused to approve the settlement, however, stating that racial preferences could lawfully be granted only to "actual victims" of the alleged discrimination. This Court found the order to be appealable under § 1292(a)(1) both because it might deprive the parties of the opportunity to settle the case on their negotiated terms and because it prevented the plaintiffs from obtaining the immediate restructuring of the employer's transfer and promotional policies which they had sought in their complaint. Accordingly, the Court held, "any further delay in reviewing the propriety of the District Court's refusal to enter the decree might cause them serious or irreparable harm." 450 U.S. at 89.

The harm that the petitioners in *Carson* might have suffered surely pales in comparison to that confronting

respondents in the present case. It does not denigrate the personal and societal importance of a nondiscriminatory workplace to acknowledge that there can be no more valuable interest than the health and safety of one's family and community. As described above, the ongoing contamination of the groundwater and the environment in which respondents live and work poses a continuing threat to the health, welfare, and property of the local residents. In contrast to the lost job opportunities caused by delaying appellate review in *Carson*, the injury that respondents will suffer from any delay in implementing fully effective remedial measures is truly noncompensable and irreparable. Respondents moved to intervene in this action precisely because the remedies sought by the original parties — all of whom allegedly caused or contributed to the existing hazard — were deemed inadequate to protect their interests. Yet the restrictions contained in the District Court's intervention order so completely inhibit respondents from obtaining the injunctive relief they have sought (on either an interim or permanent basis) that, to use *Carson*'s language, "the court did more than postpone consideration of the merits of [respondents'] injunctive claim. It effectively foreclosed such consideration." 450 U.S. at 87 n.12. And because the threat to respondents' health and environment resulting from an inadequate clean-up increases with each passing day, "any further delay in reviewing the propriety of the District Court's [order] might cause them serious or irreparable harm." *Id.* at 89.

The decision in *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234 (7th Cir. 1985), *cert. denied*, — U.S. —, 106 S.Ct. 1378 (1986), further confirms the appealability of the instant order. In that case, adjacent property owners sought an injunction under state law ordering the defendant to repair or destroy the buildings on its property and to remove all hazardous wastes stored there. On summary judgment, the district court dismissed that part of the

complaint requesting removal of the wastes on the ground that federal law preempted such relief. The court of appeals held that the order was appealable under § 1292(a)(1) as the effective denial of an injunction, noting that, according to plaintiffs, "every rainfall or melting snow flushes more of the toxic wastes into their water supply. These effects, because they are more than compensable economic losses, . . . are serious, perhaps irreparable, consequences that plaintiffs can effectually challenge only by immediate appeal." 767 F.2d at 1239 (citations omitted).

The present situation is virtually identical to that described in *Brown*: Here, too, the District Court has effectively denied that part of respondents' complaint requesting removal of the hazardous wastes; here, too, the contamination and threat to the respondents' health increases with each day that the toxic wastes are not removed and the releases continue unabated; and here, too, an appeal from final judgment would not provide respondents adequate relief from the intervening harm. *Id.* at n.3. Under the reasoning of *Carson* and *Brown*, therefore, the District Court's intervention order should be deemed appealable as the refusal of an injunction under § 1292(a)(1).

III. THE CONCERNS OF EFFICIENT JUDICIAL ADMINISTRATION AND FAIRNESS TO THE LITIGANTS SUPPORT THE APPEALABILITY OF THE DISTRICT COURT'S INTERVENTION ORDER.

Ultimately, as this Court has recognized, all questions of appealability hinge on balancing competing considerations, "the most important of which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v.*

Petroleum Conversion Corp., 338 U.S. 507, 511 (1950). Congress has attempted to formulate general statutory formulas and specific exceptions that will achieve the proper balance in most cases, but in order to avoid the occasional injustice or absurdity that might result from inflexible adherence to these rules, a "pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action.' " *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962).[39]

The Court's pragmatic approach to appealability is exemplified by *Gillespie*. The mother of a deceased seaman sued the shipowner on behalf of herself and the decedent's dependent siblings under both state law and the federal Jones Act. When the district court dismissed all claims asserted on behalf of the siblings, the plaintiff immediately appealed to the Court of Appeals, which affirmed on the merits without deciding the "close" question of appealability. This Court also affirmed, concluding that the competing considerations identified in *Dickinson*, *supra*, militated in favor of immediate appellate review:

> [I]t does not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered. . . . [I]n light of the circumstances we believe that the Court of Appeals properly implemented the same policy Congress sought to promote in § 1292(b) by treating this obviously marginal case as final and appealable under 28 U.S.C. § 1291.

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[39] *See generally Gillespie*, 379 U.S. at 152-54; *Mercantile National Bank v. Langdeau*, 371 U.S. at 558; *Forgay v. Conrad*, 47 U.S. (6 How.) 201, 203 (1848); Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 Colum. L. Rev. 89 (1975); *see also* note 19, *supra*.

379 U.S. at 153-54.[40]

As in *Gillespie*, the normally competing considerations involved in resolving appealability questions all support the Court of Appeals' decision to address the merits in this case. On the one hand, none of the costs typically ascribed to "piecemeal" review is implicated here. First, because respondents never attempted to stay the district court proceedings, there has been no delay in the ongoing litigation pending the outcome of this appeal. Second, no judicial time would be saved by postponing appeal of the intervention order until after final judgment, for the intervention question is wholly independent of the issues on the merits, and a subsequent appeal is a virtual certainty in light of the order's preclusive effect on respondents' ability to obtain the remedial relief they have sought. To the contrary, appellate review at this time can only *expedite* the ultimate resolution of this case and *reduce* the overall burden on the judicial system by preventing reversible error at the very outset of the litigation, thereby saving everyone the time, money, and effort of a trial that may well be meaningless if — on review after final judgment — respondents were held entitled to intervene as of right.[41]

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[40] In *Coopers & Lybrand*, 437 U.S. at 477 n.30, the Court cautioned against extending *Gillespie* too far beyond its facts lest § 1291 "be stripped of all significance." *But see American Export Lines v. Alvez*, 446 U.S. 274, 279 (1980) (adopting *Gillespie* rationale to review arguably non-final judgment under strict construction of 28 U.S.C. § 1257). Not only do the circumstances of the present case closely mirror those of *Gillespie*, but — unlike the class certification denial order at issue in *Coopers & Lybrand* — there is little danger that application of the *Gillespie* rationale in this situation would invite a flood of appeals on an issue largely committed to the district court's discretion. *See Davis v. Ball Memorial Hosp. Ass'n*, 640 F.2d at 35-36. Indeed, in the past century there have apparently been but a handful of orders similar to the one at issue here.

[41] Certainly, now that the Court of Appeals has ruled that respondents are in fact entitled to intervene as of right, it makes no sense to send the

Finally, there is no danger that the availability of an immediate appeal in this (or any similar) case could be used for harassment purposes, since the order could only be appealed by the unsuccessful applicant for intervention as of right, who can secure no tactical advantage from pressing an unmeritorious interlocutory appeal. *Cf. Firestone Tire & Rubber*, 449 U.S. at 374, and *Richardson-Merrell*, — U.S. at —, 105 S.Ct. at 2762-63 (noting harassment potential of disqualification motion appeals).[42]

On the other hand, denying immediate review in this case poses the grave "danger of denying justice by delay."

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case back to the District Court for lengthy and complex trial proceedings that would be conducted under the wrong rules. *Cf. Gillespie*, 379 U.S. at 153 ("[I]t seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided."); 9 Moore, *supra*, ¶ 110.12, at 151 ("The power that is recognized in *Gillespie* is necessary to sensible and economical judicial administration. . . . [O]nce an appeal has been taken in good faith, and the attendant expense of time, money and manpower has been suffered, a court of appeals is not powerless to prevent further useless expenditure.").

[42] The Court has also expressed concern that permitting routine interlocutory review of essentially discretionary decisions might undermine the authority of the district court. *See, e.g., Firestone Tire & Rubber*, 449 U.S. at 374. Such a consideration has little application here, however, where the challenged order relates to the nondiscretionary *right* to intervene — a ruling "fundamental to the further conduct of the case." *Gillespie*, 379 U.S. at 153.

Moreover, it could hardly be argued that the legitimacy of the District Court's authority would be enhanced by vacating the Court of Appeals' decision and reinstating an order that is clearly incorrect as a matter of law. The District Court's novel and unjustifiable conclusion that respondents' interests could be adequately represented by their adversaries in this litigation not only has now been unanimously rejected by the Court of Appeals below, but is contrary to countless decisions from every judicial circuit. *See generally* 7C Wright, Miller & Kane, *supra*, § 1909, at 319-23 & nn.17 & 18 (collecting cases); Pet. Supp. App. A17-A18.

Gillespie, 379 U.S. at 153 (quoting *Dickinson*, 338 U.S. at 511). As is detailed above, an extended delay in restoring respondents' right to participate meaningfully in this action — including their right to seek removal of the hazardous wastes which are seeping into their community — would "work a great injustice on them." *Id.* Even more so than in *Gillespie*, where there was no continuing threat to the parties' health and safety, prompt review of the District Court's order is required to prevent serious, if not irreparable, harm to respondents. Under these circumstances, the Court of Appeals "properly implemented the same policy Congress sought to promote" (*id.* at 154) by permitting an immediate appeal of the District Court's order denying respondents the right to intervene.[43]

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[43] In attempting to give effect to the congressional objectives underlying the finality doctrine, this Court should likewise bear in mind the substantive policies that Congress sought to have implemented in the instant proceedings. As is discussed at length in respondents' Brief in Opposition, at 15-23, Congress has recently manifested its unmistakable intent to afford respondents an absolute right to intervene in "imminent hazard" actions like this by incorporating specific intervention guarantees into the RCRA and CERCLA amendments. *See also* Pet. Supp. App. A19-A20 n.7. In its desire to ensure that the technical statutory requirements of finality are satisfied, this Court should not sacrifice the substantive congressional policies lying at the heart of this appeal.

CONCLUSION

For these reasons, the District Court's intervention order should be held appealable and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

Title 28 U.S.C. § 1292(a)(1) provides:

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court. . . .

SUPPLEMENTAL

BRIEF

Supreme Court, U.S.
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No. 85-184

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

J.B. STRINGFELLOW, JR., et al.
Petitioners,

vs.

CONCERNED NEIGHBORS IN ACTION, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF ON NEWLY ENACTED LEGISLATION

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Pursuant to Rule 35.5 of the Rules of the Supreme Court, respondents hereby submit this supplemental brief directing the Court's attention to the recent enactment into law of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, and explaining the significance of this new legislation to the instant proceedings.

I. THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986 PROVIDES RESPONDENTS WITH A STATUTORY RIGHT TO INTERVENE IN THIS ACTION.

On October 17, 1986, subsequent to the filing of respondents' brief on the merits, President Reagan signed into law the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (100 Stat. 1613). In addition to extending and increasing the funding for the federal Superfund program, this legislation made a number of clarifications and substantive changes in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.* Included among these amendments were the addition of several provisions designed to strengthen the right of local citizens to participate fully in the cleanup process, including any litigation surrounding the choice and implementation of the remedial program.[1] Of particular significance to the

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[1] The Superfund Amendments included several new sections clarifying the local residents' right to participate in the cleanup process in a variety of litigation and non-litigation contexts. For example, new section 310 of CERCLA adds a "citizen-suit" provision, granting individuals the authority to initiate civil actions against any person alleged to be in violation of "any standard, regulation, condition,

instant proceedings, Congress added a provision explicitly granting local residents like respondents a statutory right to intervene in any actions brought under CERCLA or under the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act ("RCRA")), 42 U.S.C. § 6901 *et seq.* Thus, new subsection 113(i) of CERCLA declares:

> (i) *INTERVENTION* — In any action commenced under this Act or under the Solid Waste Disposal Act in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

Pub. L. No. 99-499, § 113(c) (100 Stat. 1650).[2]

The Superfund Amendments and Reauthorization Act therefore removes any uncertainty about respondents' entitlement to intervene as of right in this action. The government expressly conceded in the Court of Appeals below that language identical to that now found in CERCLA § 113(i), when initially included in the Senate version of the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616 (98 Stat. 3221), was "intended to grant citizens like the intervenors in this case, Concerned Neighbors, intervention as of right in cases such as this one in which a federal 7003 [of RCRA] claim has been asserted." Brief for the United States and the People of the

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requirement, or order" under the Act, as well as against the federal government for an alleged failure to perform any nondiscretionary act or duty under CERCLA. Pub. L. No. 99-499, § 206 (100 Stat. 1704). In combination with the statutory intervention section set forth in the text *infra*, this "citizen-suit" provision is intended to permit local residents to challenge the choice and implementation of the cleanup plan adopted by the government and the responsible parties. Other new provisions of CERCLA guarantee citizens the right to participate in the initial process of selecting the appropriate response action (*see, e.g.*, §§ 113(k), 117), and even authorize grants for local residents to obtain technical assistance in reviewing and evaluating the possible remedial options (*see* § 117(e)). In addition, the Superfund Amendments establish extensive community-right-to-know (Pub. L. No. 99-499, § 300 *et seq.* (100 Stat. 1728)) and health assessment programs (*id.* § 110 (100 Stat. 1636) (amending CERCLA § 104(i))); under the latter provisions, persons residing in the area of a listed hazardous waste facility like Stringfellow may petition the government to initiate a health assessment to determine the potential risk to human health posed by the site.

[2] The Senate Committee Report accompanying the Superfund Amendments emphasizes that its intervention provisions "are intended to assure [sic] that persons living in close proximity (persons potentially at risk) to the subject of the government-initiated action will be able to intervene as a matter of rights . . . ." As the Report concludes:

> The purpose of the amendments is to make it easier for individuals who may be assuming an imminent and substantial risk as a result of the defendant's activities to participate in these suits, particularly in fashioning the appropriate remedy for eliminating the risk. By requiring the government to demonstrate that the applicant's interests are already represented, this amendment reverses the normal presumption of Rule 24 of the Federal Rules of Civil Procedure.

S. Rep. No. 11, 99th Cong., 1st Sess. 63 (1985). *See also* H. R. Rep. No. 253(III), 99th Cong., 1st Sess. 36-37 (1985) (intervention amendment would shift to the government the burden of establishing that it adequately represents the citizens' interests and "would appropriately lower" the barriers citizens now face to protecting their interests).

State of California (filed Dec. 7, 1984), at 28.[3] Indeed, section 113(i) was included in the Senate version of the Superfund Amendments precisely to clarify any possible ambiguity in the Hazardous and Solid Waste Amendments and to guarantee once and for all that local residents would have the right to intervene in cases like this. *See* Letter of March 4, 1985 from Steven J. Shimberg, Counsel and Director, Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works (attached hereto as an Appendix).

[3] As is explained in greater detail in the Court of Appeals' opinion, the Senate version of the 1984 amendments to RCRA, employing language virtually identical to that now found in CERCLA § 113(i), had granted local residents the right to intervene in any "imminent hazard" action brought by the state or federal governments under RCRA §§ 7002(a)(1)(B) or 7003. However, in the process of renumbering and restructuring the Senate's "citizen-suit" provision to reconcile it with the House version, an ambiguity was unintentionally introduced into the final statutory language, leading the government to argue below that, despite the manifest congressional intent, the final intervention provision actually afforded citizens statutory intervention as of right only in other *citizen-initiated* "imminent hazard" actions — not in *government-initiated* § 7003 actions like the present case. *See generally* Brief for the United States and the People of the State of California (filed Dec. 7, 1984), at 27-29; Appellants' Reply Brief (filed Dec. 17, 1984), at 13-17; Court of Appeals' Opinion, at A-19 n.7 (Pet. Supp. App. A19 n.7). As noted in the text, Congress sought to correct this drafting error in the RCRA Amendments by also including all RCRA actions within the scope of the new intervention provision added to CERCLA by the Superfund Amendments and Reauthorization Act.

II. ENACTMENT OF THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986 EFFECTIVELY MOOTS THE ISSUE RAISED IN THIS CASE AND WARRANTS DISMISSAL OF THE WRIT OF CERTIORARI.

In denying respondents' motion for leave to intervene as of right, the District Court held that none of the environmental statutes involved in this case conferred a statutory right to intervene in "imminent hazard" actions, specifically rejecting respondents' claim to such a right under RCRA. *See* Pet. App. A7-A9.[4] As discussed above, however, the subsequent amendments to RCRA and CERCLA have now demonstrated the error of the District Court's ruling by revealing the unmistakable congressional intent to afford citizens the right to intervene in government-initiated enforcement actions like the instant case. This recently enacted legislation is therefore significant in two different respects.

First, although perhaps not technically mooting the jurisdictional question presented to this Court for review, the recent Superfund Amendments have certainly deprived the issue of practical significance: If respondents prevail in this Court on the "appealability" issue, they will maintain their intervention-as-of-right status pursuant to the Court

[4] Because the Court of Appeals found that respondents were entitled to intervene as of right under the general authority of Fed. R. Civ. Pro. 24(a)(2), it had no occasion to rule on the statutory right of intervention question pursuant to Rule 24(a)(1). The Court of Appeals nevertheless acknowledged the "persuasiveness" of respondents' claim under Rule 24(a)(1), agreeing that their argument "appears to have considerable merit." Pet. Supp. App. A19 & n.7.

of Appeals' decision; but even if petitioners were to prevail, respondents upon remand could request that the District Court reconsider the initial intervention ruling, either pursuant to Fed. R. Civ. Pro. 60(b) (*see generally Above the Belt v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99 (E.D. Va. 1983) (reconsideration appropriate where there has been a significant change in law or fact)), or under the inherent power of the district courts. *See, e.g., Hodgson v. United Mine Workers of America*, 473 F.2d 118, 125-26 & n.38 (D.C. Cir. 1972) ("the law recognizes the power and responsibility of the court to reconsider its ruling [on intervention] if a material change in circumstance has in fact occurred"); *see also Greene v. Union Mutual Life Ins. Co. of America*, 764 F.2d 19, 22 (1st Cir. 1985). In light of the subsequent change in governing law and the government's concession below that respondents satisfy the new statutory standard for intervention as of right, the District Court would likely grant a motion for reconsideration and revise its initial ruling. For this reason, enactment of the Superfund Amendments has "alter[ed] drastically the potential impact of any decision [this Court] might reach in this case," thus minimizing the justification for exercising its discretionary power of review upon writ of certiorari. *Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 498-99 (1971) (Harlan, J., concurring); *see also Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 78-79 (1955); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation.").

Second, this recent legislative enactment bears significantly on disposition of the merits of the jurisdictional issue, as well. As discussed in respondents' brief on the merits, all questions of appealability ultimately hinge on

balancing competing considerations, "the most important of which are the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). Certainly, one of the factors that must be considered upon review in any case is the extent to which the appealability determination will promote congressional objectives. Likewise, the effect of this Court's decision on "the achievement of the 'just, speedy, and inexpensive determination of every action' " should weigh heavily in the Court's analysis. *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962). In this case, where a subsequent congressional enactment has now expressly confirmed the soundness of the Court of Appeals' decision on the merits, it would plainly serve neither the Congress' intent, the policies of finality, nor the ends of justice to vacate that decision and remand the matter to the District Court for further proceedings. The judgment of the Court of Appeals should be affirmed. *See generally Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).

Respectfully submitted,

FREDRIC D. WOOCHER
JOEL R. REYNOLDS*
CARLYLE W. HALL, JR.
JOHN R. PHILLIPS
LISA FOSTER

Center for Law in the
Public Interest

Counsel for Respondents

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APPENDIX

APPENDIX

UNITED STATES SENATE
Committee on Environmental
and Public Works
Washington, D.C. 20510

March 4, 1985

Mr. Fredric D. Woocher, Esquire
Center for Law in the Public Interest
10951 W. Pico Boulevard, 3rd Floor
Los Angeles, California 90064

Dear Mr. Woocher:

Thank you for bringing to my attention what you perceived to be a drafting error in the provisions of the Hazardous and Solid Waste Amendments of 1984 regarding citizen intervention in imminent hazard actions. Your analysis is absolutely correct in that no substantive change was intended from the original Senate bill (S.757) with respect to the intervention provisions. Having been chief counsel to Senator John H. Chafee in his capacity as Chairman of the Conference Committee, I can assure you that there was no discussion in the conference of making any substantive alteration to the Senate bill's intervention provisions. Specifically, it was not the intent of the conference to retreat from the provisions of the Senate bill granting citizens the statutory right to intervene in imminent hazard actions brought by the Federal government under § 7003 (and not just those brought by other "persons" pursuant to § 7002(a)(1)(B)), as long as the

conditions of subsection (b)(2)(E) are satisfied. I regret that the language that emerged from the conference substitute is susceptible of such an interpretation, for the Senator and his colleagues continue to believe that the right of intervention is an important mechanism for ensuring citizen involvement in litigation and proposed settlements between EPA and defendant companies.

Since you first brought this matter to our attention, we have been considering what actions might be taken to correct and to clarify the technical error in the statutory language. In this regard, you will be pleased to know that on Friday, March 1, 1985, the Senate Committee on Environment and Public Works approved and ordered to be reported favorably to the Senate S.51, a bill to extend and amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. In the course of considering S.51, the Committee approved an amendment that will correct and clarify this technical error. The relevant portion of the amendment is as follows:

> "(c) In any action commenced by the President or a State, under this Act or under the Solid Waste Disposal Act, in a court of the United States, any person may intervene as a matter or right when the applicant claims an interest relating to the subject of the action and such applicant is so situated that the disposition of the action may, as a practical matter, impair or impede such applicant's ability to protect that interest, unless the President or the State shows that the applicant's interest is adequately represented by existing parties."

A copy of the complete amendment is enclosed.

I will be sure to keep you informed on this and further developments. Thank you again for your concern and interest in these matters.

Sincerely,

/s/

Steven J. Shimberg
Counsel and Director
Subcommittee on Environmental
Pollution

AN AMENDMENT TO BE OFFERED BY
SENATOR BAUCUS AND SENATOR HART

[offered and
adopted 3/1/85
SJS]

On page 6, after line 7, insert the following:

"Sec. ____. Title I of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 is amended by adding at the end thereof the following new section:

"Sec. 118. (a) Except as provided in subsection (b) of this section, any person may commence a civil action on such person's behalf-

"(1) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the Eleventh Amendment to the Constitution, who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this Act; or

"(2) against the President for failure to perform any act or duty under this Act which is not discretionary with the President. Any action under this subsection shall be brought in the district court for the district in which the alleged violation occurred. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such requirement, to order the President to perform such act or duty, as the case may be, or to order such person in violation of any standard, regulation, condition, requirement, or order to

take such action as may be necessary to correct the violation or to apply appropriate civil penalties under this Act: Provided, however, that no district court shall have jurisdiction under this section to review any challenges to response action selected under section 104 or any order issued under section 104, or to review any order issued under section 106(a).

"(b) No action may be commenced under subsection (a) of this section (1) prior to ninety days after the plaintiff has given notice of the violation or disposal (A) to the President, or (B) to the State in which the alleged violation or disposal occurs; and (C) to any alleged violator of a standard, regulation, condition, requirement, or order; or (2) if the President or State has commenced and is diligently prosecuting an action under this Act or the Solid Waste Disposal Act to require compliance with such standard regulation, condition, requirement, or order.

"(c) In any action commenced by the President or a State, under this Act or under the Solid Waste Disposal Act, in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and such applicant is so situated that the disposition of the action may, as a practical matter, impair or impede such applicant's ability to protect that interest, unless the President or the State shows that the applicant's interest is adequately represented by existing parties.

"(d) In any action under this section, the United States or the State may intervene as a matter or right.

"(e) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance wth the Federal Rules of Civil Procedure.

"(f) Nothing in this Act shall restrict or expand any right which any person (or class of persons) may have under any Federal or State statute or common law to seek enforcement of any standard or requirement relating to hazardous substances or to seek any other relief (including relief against the President or a State agency)["]

REPLY BRIEF

Supreme Court, U.S.
FILED
JAN 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-184

In the Supreme Court of the United States

OCTOBER TERM, 1986

J.B. STRINGFELLOW, JR., ET AL., PETITIONERS

v.

CONCERNED NEIGHBORS IN ACTION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

CHARLES FRIED
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Washington, D.C. 20530
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30pp

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REPLY BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

In our opening brief, we argued that the district court's order granting limited permissive intervention, but denying intervention as of right, to respondents is not immediately appealable, for several reasons. First, we explained (U.S. Br. 20-23) that the district court's order is not appealable as the denial of intervention, because respondents, as parties to this case, can appeal from a final judgment. Second, we showed (U.S. Br. 24-31) that the limitations placed on respondents' participation in this lawsuit do not render the district court's order immediately appealable. Rule 24, Fed. R. Civ. P., authorizes the district courts to place conditions on an intervenor's participation, and an intervenor can challenge the validity of any such condition on appeal from a final judgment. Finally, we demonstrated (U.S. Br. 31-35) that the district court's order is not an appealable collateral order, primarily (but not exclusively) because limited intervenors, like respondents, can appeal from a final judgment and can then raise any claim that the district court's judgment should be modified or reversed.

Respondents offer several arguments in defense of the court of appeals' judgment, but their efforts are flawed in two central respects. First, respondents have failed to explain why they, as intervenors, should be entitled to obtain interlocutory appellate review of a pretrial order limiting the claims they may assert, the discovery they may request, and the motions they may file, when none of the original parties to this (or any similar) case could immediately appeal similar restrictions imposed on their rights. Unless intervenors are to be given a legal status superior to the one held by the original parties to a case, respondents must await the entry of a final judgment before obtaining appellate review of their claims. Second, as a practical matter respondents in fact are in a position superior to that of the plaintiff in an ordinary civil suit, because respondents are not the only party interested in cleaning up the Stringfellow site and remedying the environmental harms it has caused. The United States brought this suit against petitioners (and others) to obtain a complete remedy of the type that respondents claim the district court has not allowed them to seek. Respondents therefore may obtain complete relief through the efforts of the plaintiff governments alone.

1. Respondents' primary contention (Resp. Br. 10-21) is that the district court's order is immediately appealable under *Brotherhood of R.R. Trainmen* v. *Baltimore & O.R.R.*, 331 U.S. 519 (1947), because it effectively denied them the right to intervene. Respondents do not argue that a district court's decision to place limitations on an intervenor is tantamount in every case to the denial of the right to intervene. Rather, their argument is that *these* particular conditions are so burdensome that *they* amount to the denial of the right to intervene in *this* case. Respondents characterize (Resp. Br. 19 n.15) the district court's order as granting them no more than the right to appeal, which, they argue, is merely one "incident" of the right to intervene. Respondents appear to concede (Resp. Br. 20) that the right to appeal after entry of a final judgment may be sufficient to protect

an intervenor whose interest is "pecuniary and hence fully compensable at the end of the case," but they assert (*ibid.*) that their interest in preventing the contamination of their communities can be protected only by granting them the same rights to participate as the other parties.

Respondents have confused the question whether the district court properly limited their participation in this lawsuit with the materially different question whether the court of appeals should now decide whether their participation was properly limited. Under the *Brotherhood of R.R. Trainmen* case, a would-be intervenor who is excluded from the case but claims entitlement to be a party may obtain immediate appellate review of the district court's order because he cannot protect his rights either at the trial level or on appeal. 331 U.S. at 524-525. An order excluding from the case a would-be intervenor whose rights will be determined without having any opportunity to protect them is precisely the type of order that can only be reviewed independently of a final judgment. If an intervenor enters a case, however, he has an opportunity to protect his interests at the trial level under the terms set by the district court. But even if he can do no more than appeal from the final judgment, he can seek relief from the court of appeals, which can award, among other things, the "plainly adequate" remedy of a new trial. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 378 (1981). Thus, so long as an intervenor can protect his interests at trial *or* on appeal —and respondents clearly can do both (see U.S. Br. 32-35)—the rule adopted in *Brotherhood of R.R. Trainmen* is inapposite, regardless of the particular conditions imposed on the intervenor's participation.

There is also no merit to respondents' claim (Resp. Br. 16-17) that denying a party interlocutory appellate review of a district court order granting limited permissive intervention will nullify that party's right to intervene under Fed. R. Civ. P. 24(a). Like other rights provided by the Rules, the right to intervene is not to be pursued by

means that detract from, rather than contribute to, the resolution of the case. As we have explained (U.S. Br. 24), Rule 24 was adopted to allow a person to protect his interests by entering into an ongoing suit. If a would-be intervenor becomes a party to a case by permission, the question whether he had the right to intervene is of no continuing importance except as it may relate to the issue whether any limitations imposed on his participation were proper. If the limitations do not prejudice the intervenor's ability to protect his interests, he will have no need or reason to challenge the conditions on appeal. If he believes that the limitations were prejudicial, he can raise that issue on appeal from a final judgment. He can then argue that he had the right to intervene, that the limitations could not or should not have been placed on an intervenor as of right, and that the conditions prejudiced his ability to defend his interests. A district court therefore cannot insulate from review an order denying an applicant intervention as of right by simultaneously granting him limited permissive intervention. In sum, nothing in *Brotherhood of R.R. Trainmen* supports respondents' argument, and there is no reason to extend the carefully circumscribed holding of that case to limited intervenors such as respondents.[1]

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[1] After respondents filed their brief, the President signed into law the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 *et seq.* (Oct. 17, 1986), which amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. (& Supp. II) 9601 *et seq.* The provisions of SARA became effective on the date of enactment except as specifically provided in the Act. Pub. L. No. 99-499, § 4; H.R. Conf. Rep. 99-962, 99th Cong., 2d Sess. 183-184 (1986). The provisions of SARA relevant here are found in Section 113 (App., *infra*, 1a-4a), and that section contains no specific effective date for these provisions. Section 113 therefore applies to this case. See *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711-716 (1974).

Section 113(i) provides for conditional intervention as of right for private parties such as respondents in government-initiated enforcement actions under CERCLA as well as actions under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. (& Supp. II) 6901 *et seq.* A would-be intervenor must show that he has an interest relating to the subject of the action and that his interest may, as a practical matter, be impaired if he is not allowed to intervene in the action. If the applicant makes that showing, he is entitled to intervene unless the government shows that his interests are adequately represented by existing parties. App., *infra*, 1a-2a; see also H.R. Rep. 99-253, 99th Cong., 1st Sess. Pt. 3, at 24 (1985). Accordingly, respondents will be able to intervene as of right on remand even if the court of appeals' judgment is vacated for lack of appellate jurisdiction. This case is not moot, however, because SARA Section 113(i) does not forbid a district court from imposing conditions of the type that are at issue here, and it is those conditions, in respondents' view, that make the district court's order immediately appealable.

2. Respondents also maintain (Resp. Br. 21-34) that the district court's order is an appealable collateral order under the three-part test adopted in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). Respondents' argument, however, is flawed in two fundamental respects. First, the relevant aspect of the district court's order is not the denial of respondent's application to intervene as of right, as respondents claim, but is the limitations on their participation in this action. Only those conditions affect respondents' ability to protect their interests, and only that aspect of the district court's order is relevant here. Second, the relevant question is not merely whether this specific order is immediately appealable, as respondents claim, but is whether district court orders granting limited permissive intervention, "in the generality of cases" (*Carroll* v. *United States*, 354 U.S. 394, 405 (1957)), are separate from the merits of the underlying action. Respondents make no effort to prove that they are. As we have shown (U.S. Br. 24-28 & n.22), such orders come in many shapes and sizes, and there is no reason to assume that in most cases they can be reviewed without considering "the nature and content of th[e] proceedings" in which they are entered (*Richardson-Merrell Inc.* v. *Koller*, No. 84-127 (June 17, 1985), slip op. 15). In any event, respondents' arguments fail even when considered only in the context of the district court's order in this case.

a. The district court's order does not satisfy the second requirement of the collateral order exception, because it is not "completely separate from the merits of the action." *Coopers & Lybrand*, 437 U.S. at 468. As we explained in our opening brief (U.S. Br. 24-26), there is no per se rule forbidding a district court from limiting an intervenor's participation in a lawsuit. Rule 24, Fed. R. Civ. P., authorizes the district courts to impose "appropriate conditions or restrictions" on an intervenor (Fed. R. Civ. P. 24 advisory committee note (1966 Amendment), 28 U.S.C. App. at 567), and respondents do not contend that no such condition is ever valid. The question whether a district court properly exercised its authority in a given case will require a reviewing court to decide whether the particular conditions imposed on an intervenor prejudiced its ability to protect its interests in the lawsuit. The second *Coopers & Lybrand* condition is not satisfied, however, if the right asserted by a party is not violated in the absence of prejudice. *Richardson-Merrell*, slip op. 14; *Flanagan* v. *United States*, 465 U.S. 259, 268 (1984). Accordingly, for reasons similar to those given in *Richardson-Merrell* and *Flanagan*, district court orders placing conditions on intervenors are "inextricably tied up in the merits" of the case (*Richardson-Merrell*, slip op. 14) and are not a fit subject for interlocutory appellate review.

This case illustrates that point. Respondents were not ordered to stand idly by while this suit goes forward; on the contrary, respondents can litigate the same claims asserted by the original parties (Pet. App. A19), and respondents are entitled to receive every item of discovery that any other party obtains (*id.* at A20). Respondents are also not the only parties interested in a complete clean-up of the Stringfellow hazardous waste site or in an effective remedy for the environmental harm it has caused. After all, the United States filed this suit against petitioners (and others) under Section 106(a) of CERCLA, 42 U.S.C. 9606(a), among other statutes (U.S. Br. 3 n.2), on the ground that the Stringfellow site posed an "imminent and substantial endangerment to the public health" (E.R. 31-34). Section 106(a) of CERCLA confers jurisdiction on the district court in which such a threat occurs "to grant such relief as the public interest and the equities of the case may require" (42 U.S.C. 9606(a)), and respondents will benefit from every successful claim the government has alleged.[2] The result is that respondents may ultimately obtain complete relief through either their own efforts or those of the United States. Accordingly, at this early stage of the case a reviewing court cannot begin to answer the question whether respondents will be prejudiced by the conditions placed on their participation.[3]

b. The district court's order also does not meet the third requirement of the collateral order exception, because the limitations imposed on respondents' participation are not "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468. Respondents claim (Resp. Br. 27-34) that the district court's order is effectively unreviewable because they will be unable as a practical matter to convince the court of appeals to modify the remedy approved by the district court for the Stringfellow site, even if they could persuade the court of appeals that the limitations were improper. Respondents also assert (Resp. Br. 29 n.24) that obtaining a remand would be a pyrrhic vic-

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[2] Indeed, on September 23, 1986, the special master assigned to this case issued a 303-page report recommending that the district court grant the United States' motion for partial summary judgment against the defendants. *United States* v. *Stringfellow*, No. CV 83-2501 (JMI) (Mx) (C.D. Cal.) (special master). (We have lodged a copy of the report with the Clerk). The district court has not yet ruled on the defendants' objections to the report.

[3] Alternatively, even if respondents could establish a violation of their rights as intervenors without showing prejudice, a pretrial order limiting their participation could be reviewed as effectively on appeal from a final judgment as on an interlocutory appeal. In that case, the district court's order would not meet the third *Coopers & Lybrand* condition, because it would not be effectively unreviewable on appeal from a final judgment. *Richardson-Merrell*, slip op. 14; *Flanagan*, 465 U.S. at 268.

tory, because the additional litigation following a remand will delay the adoption of the appropriate remedy and that delay will irreparably injure them. Respondents have made no effort, however, to distinguish the practical difficulties which result from delaying appellate review until final judgment from the same type of practical difficulties and costs inherent in all appeals by unsuccessful plaintiffs who were not intervenors.

Specifically, respondents have failed to explain why taking an appeal from a final judgment would not allow them fully to protect their interests by challenging the remedial program imposed by the district court. Respondents assert (Resp. Br. 21) that "the fate of their community will essentially have been decided" by that point and that "the right to appeal will at best have only theoretical importance," but they have not identified any peculiarity of this suit which makes their burden as appellants any more onerous than that borne by any other party who seeks to overturn a trial court's judgment. Respondents contend (Resp. Br. 19 n.15) that the limitations rob them of the "basic tools" necessary to make a record for appeal, but the additional claims that respondents sought to assert and the additional parties they sought to join are set forth in their complaint and are already part of the record. Respondents will experience no more difficulty challenging the portion of the district court's order excluding these claims and parties than would any other party who has had some claims dismissed. Similarly, respondents' anticipated difficulty in obtaining appellate review of the district court's limitation on their discovery is no different from the "probable unreviewability of virtually any discovery order" (*EEOC* v. *Neches Butane Products Co.*, 704 F.2d 144, 151 (5th Cir. 1983)). But see, *e.g.*, *Duke* v. *University of Texas*, 729 F.2d 994 (5th Cir.), cert. denied, 469 U.S. 982 (1984) (order restricting plaintiff's discovery reversed on appeal from final judgment as an abuse of discretion). The appellant normally bears the burden of proving that he was prejudiced by the absence of certain evidence (*Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943)),

and intervenors such as respondents do not warrant an exception from this rule.

3. Respondents also maintain (Resp. Br. 34-43) that the district court's order is immediately appealable under 28 U.S.C. 1292(a)(1) as an order "refusing * * * [an] injunction[]." Respondents argue that, by preventing them from asserting certain claims in their proposed complaint-in-intervention, the order had the practical effect of denying them the injunctive relief they sought under those claims. In addition, respondents claim that, by limiting their opportunity to engage in discovery and to file motions, the order prevented them from requesting preliminary injunctive relief.[4]

In its original opinion in this case, the court of appeals rejected respondents' contention that the district court's order was appealable under 28 U.S.C. 1292(a)(1). The court of appeals found that respondents had not shown "the requisite 'serious, perhaps irreparable consequence[s]' or inability to challenge the order effectively at some other point" (Pet. App. A25, quoting *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981)). The court of appeals did not address the applicability of 28 U.S.C. 1292(a)(1) in its final opinion issued on rehearing (Supp. Pet. App. A10-A11). After the court of appeals issued its decision, Congress enacted the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 *et seq.* (Oct. 17, 1986), which extensively revised the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. (& Supp. II) 9601 *et seq.*, under which this suit was brought. Those amendments apply to this case (page 4 note 1, *supra*) and establish an elaborate framework for the liti-

[4] Respondents' complaint sought an injunction requiring petitioners and the plaintiff governments to accomplish four goals: (a) to abate the release and threatened release of all hazardous wastes at the site; (b) to remedy the conditions caused by the dumping of hazardous wastes at the site; (c) to remove all hazardous wastes from the site; and (d) to establish a program to monitor the health of the residents of the communities near the site (E.R. 179-180).

gation of such cases, including the claims that parties such as respondents may assert and the authority of the courts to award injunctive relief. Respondents, however, have not yet sought any specific form of injunctive relief. Should they do so in the course of further proceedings, the lower courts will, of course, consider any such request, and the question of appealability, in light of the amendments adopted by SARA.

The present order, however, is not appealable under 28 U.S.C. 1292(a)(2). A district court order is immediately appealable under that provision only if the order satisfies three criteria: (1) it must, in terms or in practical effect, refuse a party an injunction; (2) it must have a potentially serious, perhaps irreparable, consequence; and (3) it must be effectively reviewable only by an immediate appeal. *Carson* v. *American Brands, Inc.*, 450 U.S. at 84; *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478, 480-482 (1978). The district court's order fails that test.

a. The district court's order is not appealable on the ground that it denies respondents the opportunity to seek preliminary injunctive relief. The order did not in terms deny respondents such relief, and, in fact, in the 23 months since the order was entered respondents have not sought any preliminary injunctive relief in this case.[5] There is also no reason to conclude that the district court

[5] The United States and California have taken several interim steps to abate the release and threatened release of hazardous substances from the Stringfellow site. For example, in November 1982 the state Department of Human Services began extracting contaminated groundwater from the site to limit the flow of groundwater through it and to slow the migration of contaminants from it. Between May and November 1983, the Environmental Protection Agency and the Coast Guard carried out several emergency responses to the discovery of liquids contaminated with hazardous substances below a barrier dam (installation of a drain in the seepage area with a sump pump to collect liquids, improvement of drainage channels, and installation of upgradient pumps to collect and divert uncontaminated groundwater around the site). And in December 1985 a pretreatment plant, designed to remove hazardous substances from extracted water so that the water could be disposed of, went into operation at the site.

will not consider a specific request by respondents for interim relief. The district court placed conditions on respondents' intervention "to minimize any delay and confusion involved *in discovery* in this large, complex case" (Pet. App. A20 (emphasis added)). The court did not consider the subject of injunctive relief, and the court should be given the opportunity to construe or modify its order in the context of a specific claim for an injunction. Obviously, not every order limiting discovery is subject to immediate appeal under 28 U.S.C. 1292(a)(1) merely because it could make it more difficult for a party to obtain injunctive relief. Here, where respondents have not yet even sought such relief, it is entirely speculative whether the district court's order will foreclose respondents from seeking preliminary injunctive relief, or from filing any motion at all, because respondents may be able to obtain the necessary consent.[6]

b. The district court's order is also not appealable on the ground that it denies respondents the opportunity to seek permanent injunctive relief, for several reasons.

i. First, the intervention order did not have an "'irreparable'" effect on respondents' ability to seek relief under their additional claims (*Gardner*, 437 U.S. at 480). The district court did not address the merits of those claims; it simply declined, in the exercise of its discretion, to permit respondents to raise them in this suit. Since respondents can assert those claims in an independent action for relief, the order had no "direct or irreparable impact" on their opportunity to pursue these claims for injunctive relief against the defendants

[6] Respondents have even now failed to specify the type of preliminary injunctive relief they will seek. Respondents' complaint does not allege that any of the defendants or third-party defendants are presently dumping hazardous wastes at the site, and respondents cannot invoke the district court's equitable authority to obtain a preliminary injunction that is equivalent to the ultimate relief sought by respondents. *Brown* v. *Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1240 (7th Cir. 1985), cert. denied, No. 85-1258 (Mar. 10, 1986). Accordingly, respondents' repeated assertion (Resp. Br. 40, 42) that the district court's order will bar them from seeking an interim remedy is premature or unfounded.

or plaintiff governments under these claims. Cf. *Carson*, 450 U.S. at 85; *Gardner*, 437 U.S. at 482.[7]

Second, although the district court barred respondents from injecting new claims into this action, respondents may be able to obtain complete relief under the claims that they were allowed to litigate. The United States brought this suit under CERCLA Section 106(a), 42 U.S.C. 9606(a), which grants the district court authority to award the United States broad injunctive relief. Every private party named in respondents' complaint was named in the second amended complaint filed by the plaintiff governments or in the claims filed by the defendants (see E.R. 356-366, 610-614). The district court permitted respondents "to intervene in the litigation of the issues raised by the original parties" (Pet. App. A19) and thereby allowed respondents to participate in the remedial stage of this lawsuit. Only the United States can obtain injunctive relief under CERCLA Section 106(a),[8] but respondents can urge the same injunctive relief sought by the United States. Cf. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 532-537 (1972).

Moreover, respondents' additional claims do not enhance their ability to obtain injunctive relief against the defendants. The first three such claims (E.R. 165-171)

[7] Moreover, if the EPA were not involved in response activities at the Stringfellow site, respondents could seek injunctive relief under state law in federal court under diversity jurisdiction or in state court. Section 206 of SARA amended CERCLA by adding a new provision, Section 310(h), which clarifies that CERCLA does not "affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 113(h)" of SARA. See H.R. Conf. Rep. 99-962, *supra*, at 224. SARA Section 113(h), which governs the timing of any civil action that would amount to a challenge to the agency's removal or remedial actions or orders, would not affect a civil action seeking injunctive relief under state law at a site where the agency was not pursuing a response activity.

[8] That is because Section 106(a) expressly authorizes only the federal government to abate an actual or threatened release of hazardous substances. *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1049-1050 (2d Cir. 1985).

allege violations of three different federal environmental laws.[9] Section 121(d)(2) of SARA, however, requires that the remedies selected by the EPA under CERCLA meet the standards, requirements, and limitations established by the other federal statutes cited by respondents. SARA § 121(d)(2), Pub. L. No. 99-499. These statutes therefore do not empower a district court to award respondents any different or additional relief that they could not obtain under SARA. The next group of claims that respondents were not permitted to assert were state law tort claims (E.R. 171-177). These claims also do not add to the relief that respondents can seek against the defendants, and respondents cannot obtain injunctive relief against the plaintiff governments on these claims.[10] The final claim that respondents were not allowed to raise sought damages, not injunctive relief (E.R. 178-179).[11] Accordingly, the intervention order does not deny respondents any opportunity to obtain permanent injunctive relief against the defendants. See *Gardner*, 437 U.S. at 480-481 (order denying class certification merely limits the scope of injunctive relief and is not appealable under 28 U.S.C. 1292(a)(1)).[12]

[9] Pursuant to Section 505 of the Clean Water Act, 33 U.S.C. 1365; Section 1441 of the Safe Drinking Water Act, 42 U.S.C. 300j; and Section 7002 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. (& Supp. II) 6972.

[10] *Hatahley* v. *United States*, 351 U.S. 173, 182 (1956) (Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, does not authorize district courts to enjoin the United States or its agents); C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3658, at 325 (2d ed. 1985) (same); *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89 (1984) (Eleventh Amendment bars district courts from enjoining state officials at the behest of private parties for violations of state law).

[11] Respondents sought damages from several California agencies under an inverse condemnation theory. Moreover, federal jurisdiction for this claim was alleged under 42 U.S.C. 1983, and that statute does not authorize suit against California or its agencies. *Quern* v. *Jordan*, 440 U.S. 332, 337-346 (1979).

[12] For that reason, respondents' reliance (Resp. Br. 42-43) on *Brown* v. *Kerr-McGee Chemical Corp.*, *supra*, is misplaced. There,

ii. CERCLA, as amended by SARA, also demonstrates the likelihood that respondents will be able to obtain complete relief. CERCLA authorizes the Administrator of the Environmental Protection Agency (EPA), as the designee of the President,[13] in cooperation with state governmental authorities to identify and clean up hazardous substance [14] sites, like the Stringfellow Acid Pits, in several ways. First, CERCLA requires the EPA to compile a list of the sites in need of remedial action.[15] The EPA must then establish an administrative record upon which it will propose an appropriate response.[16] After-

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the district court dismissed the only claim on which the plaintiffs had sought injunctive relief. 767 F.2d at 1238-1239.

[13] Pursuant to his authority under Section 115 of CERCLA, 42 U.S.C. (& Supp. II) 9615, the President has delegated to the Administrator of the EPA the responsibility for enforcing CERCLA. 40 C.F.R. 300.2; Exec. Order No. 12,316, 46 Fed. Reg. 42237 (1981).

[14] In defining the term "hazardous substance," CERCLA incorporates by reference the substances designated as hazardous or toxic under the Clean Air Act, 42 U.S.C. 7412; the Clean Water Act of 1977, 33 U.S.C. 1317(a), 1321(b)(2)(A); the Resource Conservation and Recovery Act of 1976, 42 U.S.C. (& Supp. II) 6921; and the Toxic Substances Control Act, 15 U.S.C. 2606. 42 U.S.C. 9602(a). CERCLA also authorizes the EPA to designate additional substances that "may present substantial danger to the public health or welfare or the environment" (*ibid.*). See 50 Fed. Reg. 13456, 13474 (1985) (list of such substances).

[15] CERCLA § 105(8), 42 U.S.C. 9605(8). The list, known as the National Priority List, is part of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. Pt. 300, required by Section 105 of CERCLA, 42 U.S.C. 9605.

[16] The NCP sets forth a three-step administrative process for selecting a remedy for a site. The first step involves the completion of a Remedial Investigation/Feasibility Study (RI/FS), which entails the investigation of a site at which hazardous substances have been located, an assessment of the extent to which contaminants have migrated from the site, the methods for remedying the release of hazardous substances, and the criteria for determining the appropriate extent of cleanup activities. The second step involves making the RI/FS available for notice and comment by the potentially responsible parties and the public. In the final step, EPA evaluates the comments received, and it prepares a decision selecting

wards, the agency must publish a notice and brief analysis of its proposed remedy and offer the public a reasonable opportunity to comment.[17] Once a final plan is selected, the EPA then may itself perform the remedial measures necessary to clean up a site and later sue the potentially responsible parties [18] for reimbursement of EPA's cleanup costs.[19] Alternatively, the agency may issue administrative orders directing the potentially responsible parties to undertake such remedial steps as the Administrator deems necessary to protect the public health and environment,[20] or the United States may bring suit to obtain an injunction requiring the potentially responsible parties to carry out whatever measures are necessary to clean up a site posing an "imminent and

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a particular cleanup remedy. Sections 113(k) and 117 of SARA require the EPA to promulgate regulations permitting interested and potentially responsible parties to participate in the development of the administrative record on which the EPA will base its decision. App., *infra*, 2a-4a.

[17] SARA § 117, Pub. L. No. 99-499.

[18] CERCLA sets forth four classes of "responsible parties," including generators and transporters of hazardous substances, and past and present owners and operators of hazardous waste disposal facilities. See CERCLA § 107(a), 42 U.S.C. 9607(a).

[19] Section 104(a)(1) of the Act, 42 U.S.C. 9604(a)(1), empowers the EPA to undertake "response measures" (*i.e.*, to clean up a hazardous waste site) in the case of an actual or threatened release of a hazardous substance. Response measures include a variety of investigative, evaluative, and cleanup activities, and they may involve either short-term "removal" or longer-term "remedial" actions designed to effect a permanent remedy. CERCLA § 101(23), (24) and (25), 42 U.S.C. 9601(23), (24) and (25). Section 111(a) of CERCLA, 42 U.S.C. 9611(a), allows the EPA to expend monies from the Hazardous Substance Response Trust Fund (CERCLA § 221, 42 U.S.C. 9631), commonly known as the Superfund, to undertake remedial actions under CERCLA Section 104(a)(1). Sections 104(b) and 107 of the Act, 42 U.S.C. 9604(b) and 9607, in turn, authorize the EPA to bring suit against potentially responsible parties to recover cleanup costs not inconsistent with the NCP.

[20] CERCLA § 106(a), 42 U.S.C. 9606(a).

substantial" danger to the public health and environment.[21] (The last route is being followed in this case.)

SARA carefully structures the process by which a remedy will be selected and implemented to prevent delay and to ensure that a coherent remedial approach to a particular site is carried out. Section 122(e)(6) provides that once the EPA has initiated an investigation of a particular site, or once a potentially responsible party has begun such a study pursuant to an EPA order, "no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President [or the EPA]" (App., *infra*, 5a). Section 113(h) provides that a district court may review the remedy selected by the EPA when the United States brings an enforcement action. At this stage, interested private parties, such as respondents, may intervene in the action (§ 113(i)) and may challenge the remedy selected by the EPA on any ground that they have preserved in the administrative process. Judicial review, however, is limited to the administrative record, and the agency's decision may not be set aside unless it is arbitrary and capricious under the well-known standard generally applicable to review of agency action.[22] If the EPA itself carries out a response action and the government brings a cost-recovery action against the potentially responsible parties, parties such as respondents may bring an independent action to obtain review of the remedy chosen by the EPA. Judicial review is limited to the question whether the agency has complied with the cleanup standards set by SARA Section 121.[23] Finally, SARA provides relief to private parties whose health may be significantly affected by a hazardous substance site even if the EPA has not yet begun an enforcement or cost-recovery action.[24]

Congress therefore specifically addressed the concerns of citizens, like respondents, who are or may be affected by hazardous substance sites. Congress adopted procedures for public participation in the development of the administrative record on which the EPA must select the remedy for a particular site, Congress allowed parties such as respondents to participate in an enforcement action brought by the United States, and Congress empowered such parties to bring an independent action against the agency when it decides to implement a remedy itself or, in certain circumstances, when the agency has not yet acted. At the same time, SARA was specifically designed to prevent any person—either the neighbors of a site (such as respondents) or the potentially responsible parties (such as petitioners)—from interrupting the cleanup activities at a site by challenging the remedy chosen by the EPA before that response has been implemented, or an enforcement or cost recovery action has been brought.[25] In sum, SARA establishes a comprehensive

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[21] CERCLA § 106(a), 42 U.S.C. 9606(a).

[22] Pub. L. No. 99-499, § 113(h)(4), (5) and (j) (App., *infra*, 1a, 2a); H.R. Conf. Rep. 99-962, *supra*, at 224; see S. Rep. 99-11, 99th Cong., 1st Sess. 57 (1985); H.R. Rep. 99-253, 99th Cong., 1st Sess. Pt. 1, at 139, Pt. 3, at 25 (1985); see generally *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-744 (1985); *Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971). This standard was applied to the EPA's selection of a remedy under the pre-SARA version of CERCLA. See *United States* v. *Northeastern Pharmaceutical & Chemical Co.*, No. 84-1837 (8th Cir. Dec. 31, 1986), slip op. 42-43; *United States* v. *Ward*, 618 F. Supp. 884, 900 (E.D.N.C. 1985).

[23] Pub. L. No. 99-499, §§ 113(h)(4) and (5), 121, 206 (App., *infra*, 1a).

[24] For example, Section 110(6)(A) requires the Administrator of the Agency for Toxic Substances and Disease Registry (ATSDR) to perform a health assessment for each facility listed on the NPL. The Stringfellow Acid Pits are so listed. If the Administrator finds that the exposure presents a significant risk to human health, the government is directed to "take such steps as may be necessary to reduce such exposure and eliminate or substantially mitigate" the risk (SARA § 110(11), Pub. L. No. 99-499). The affected citizens may enforce a non-discretionary duty imposed by that provision through an independent citizens suit under Section 206 of SARA.

[25] Pub. L. No. 99-499, § 113(h); S. Rep. 99-11, *supra*, at 58, 61-63; 132 Cong. Rec. H9582-H9583 (daily ed. Oct. 8, 1986) (statement of Rep. Glickman).

and highly structured administrative and judicial process for the selection and implementation of the appropriate remedial measures to clean up a hazardous substance site, and that process balances the interests of all parties without prolonging the implementation of the final remedy.

For present purposes, the amendments adopted by SARA make clear that the district court's order is not immediately appealable on the ground that it denies respondents the opportunity to obtain permanent injunctive relief. In one way or another, SARA permits respondents to seek permanent injunctive relief against any of the other parties to this action once the administrative process has been completed. Neither respondents nor petitioners can circumvent the elaborate process recently adopted by Congress by the device of seeking alternative forms of relief or challenging the relief selected by the EPA. Accordingly, the district court's order is not appealable under 28 U.S.C. 1292(a)(1) as a denial of permanent injunctive relief.

4. Finally, respondents argue (Resp. Br. 43-47) that fairness and efficient judicial administration support the appealability of the district court's order. Respondents, however, in no way distinguish the effects of the order striking their proposed additional claims and limiting their right of discovery from the effects the same type of orders would have on any other party—not an intervenor under Fed. R. Civ. P. 24(a) or (b)—who clearly would not have a right to an immediate appeal. That omission is fatal to their claim. Notwithstanding the importance of the claims a party seeks to raise and despite the likelihood that the party will challenge the dismissal of those claims or limitation of discovery on a later appeal, a party must await the entry of the final judgment before seeking to correct errors that the district court may have made, unless discretionary appellate review is obtained under 28 U.S.C. (& Supp. II) 1292(b). See U.S. Br. 29-31.

Respondents' argument that the facts of this case establish a compelling need for an interlocutory appeal is misfocused. As we explained in our opening brief (U.S. Br. 33-35), the Court has often made clear that "[a]ppeal rights cannot depend on the facts of a particular case" (*Carroll* v. *United States*, 354 U.S. at 405) and "has expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal" (*Richardson-Merrell*, slip op. 14). The Court has adhered to this approach regardless of the "'extraordinary'" nature of the party's asserted need for interlocutory appellate review (*United States* v. *MacDonald*, 435 U.S. 850, 857-858 n.6 (1978)), and notwithstanding the fact that the court of appeals may have already considered, and perhaps even accepted, a party's claim that the district court's decision was wrong (*Richardson-Merrell*, *supra*; *United States* v. *MacDonald*, *supra*). See also *Coopers & Lybrand*, 437 U.S. at 468. Otherwise, a multitude of pretrial orders would be presented for interlocutory appellate review by imaginative counsel striving to fit them within a "limited" exception for "extraordinary" cases.

Although occasional delay might seem an acceptable burden to obtain an early and correct resolution of district court orders like the one entered here, the price for correcting the relatively few errors that alter the outcome of a case[26] would be dear. It would entail not only regrettable delay suffered by the parties to the case, and by other parties whose appeals await decision while orders like this one are under review, but also substantial disruption of the trial and appellate system adopted by Congress as parties like respondents punctuate the pretrial stages of a case with interlocutory appeals that result in needless—and potentially advisory—appellate

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[26] See *Richardson-Merrell*, slip op. 9: "Most pretrial orders of district judges are ultimately affirmed by appellate courts."

rulings.[27] Parties such as respondents can secure appellate review and complete relief at a later point in the proceedings. The prudent course as a matter of policy is to require them to await the entry of a final judgment, not to countenance protracted interlocutory appeals.

For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be vacated and the case remanded to that court with directions to dismiss the appeal for lack of appellate jurisdiction.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JANUARY 1987

[27] This case illustrates the point in a somewhat unusual way, since the only question decided by the court of appeals was whether respondents had a right to intervene in this action, and Congress has now by statute granted respondents a conditional right to intervene, subject to the provisions of SARA. Pages 4-5 note 1, *supra*.

APPENDIX

1. Section 113 of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 *et seq.* (Oct. 17, 1986) provides, in pertinent part, as follows:

> (h) Timing of Review.—No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 of the United States Code (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 121 (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 104, or to review any order issued under section 106(a), in any action except one of the following:
>
> (1) An action under section 107 to recover response costs or damages or for contribution.
>
> (2) An action to enforce an order issued under section 106(a) or to recover a penalty for violation of such order.
>
> (3) An action for reimbursement under section 106(b)(2).
>
> (4) An action under section 310 (relating to citizens suits) alleging that the removal or remedial action taken under section 104 or secured under section 106 was in violation of any requirement of this Act. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
>
> (5) An action under section 106 in which the United States has moved to compel a remedial action.
>
> (i) Intervention.—In any action commenced under this Act or under the Solid Waste Disposal Act in a court of the United States, any person may in-

tervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

(j) Judicial Review.—

(1) Limitation.—In any judicial action under this Act, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard.—In considering objections raised in any judicial action under this Act, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with the law.

(3) Remedy.—If the court finds that the selection of the response action was arbitrary or capricious or otherwise not in accordance with the law, the court shall award (A) only the response costs or damages that are not inconsistent with the National Contingency Plan, and (B) such other relief as is consistent with the National Contingency Plan.

(k) Administrative Record and Participation Procedures—

(1) Administrative Record.—The President shall establish an administrative record upon

which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

(2) Participation procedures.—

(A) Removal Action.—The President shall promulgate regulations in accordance with chapter 5 of title 5 of the United States Code establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

(B) Remedial Action.—The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions nd on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accord-

ance with section 117(a)(2) (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purposes of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section 117(d). The President shall promulgate regulations in accordance with chapter 5 of title 5 of the United States Code to carry out the requirements of this subparagraph.

(C) Interim Record.—Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this Act shall not include an adjudicatory hearing.

(D) Potentially Responsible Parties.—The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

2. Section 122(e)(6) of SARA provides as follows:

Inconsistent Response Action.—When either the President, or a potentially responsible party pursu-

ant to an administrative order or consent decree under this Act, has initiated a remedial investigation and feasibility study for a particular facility under this Act, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

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REPLY BRIEF

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No. 85-184

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

J.B. STRINGFELLOW, JR., et al.,
Petitioners,

vs.

CONCERNED NEIGHBORS IN ACTION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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No. 85-184

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

J.B. STRINGFELLOW, JR., et al.,
Petitioners,

vs.

CONCERNED NEIGHBORS IN ACTION, et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

I. The District Court's Order Granting Respondents Permissive Intervention but Denying Them Intervention as of Right Is Not Immediately Appealable Under 28 U.S.C. § 1291

The dominant principle of federal appellate jurisdiction is that review of interlocutory orders must await final judgment. *See Flanagan v. United States*, 465 U.S. 259, 265

(1984); *Di Bella v. United States*, 369 U.S. 121, 124 (1962). This Court has, however, carved out a limited number of narrow exceptions to the final judgment rule for specific categories of orders which affect "rights that will be irretrievably lost in the absence of immediate appeal", *Richardson-Merrell, Inc. v. Koller*, 105 S. Ct. 2757, 2761 (1985), or which "would practically defeat the right to any review at all." *Flanagan*, 465 U.S. at 265, *quoting Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940); *see also United States v. Ryan*, 402 U.S. 530, 533 (1971) (appeal permitted "where denial of immediate review would render impossible any review whatsoever" of the claim). Notwithstanding respondents suggestion to the contrary, an order granting permissive intervention but denying intervention as of right does not fall within a category of orders as to which immediate review is needed in order to prevent an irreparable loss of rights or to guarantee that a party receive its statutory right to appellate review.

As a preliminary matter, respondents contend that the most important consideration in determining whether an appeal should be permitted from an interlocutory order is whether the inconvenience and cost of the appeal outweigh the danger of denying justice by delay.[1] Although the

[1] Respondents rely on language from *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964) and *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) for this general proposition. The holding in *Gillespie*, however, was specifically limited to its facts in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n.30 (1978), and the precedential value of *Dickinson* is questionable in light of the fact that it was decided based on facts that occurred prior to the effective date of Fed. R. Civ. P. 54(b), which was enacted by Congress in order to resolve the very problem addressed in *Dickinson*. *See* 338 U.S. at 511.

balancing of these considerations is a relevant factor, this Court recently has emphasized that of equal importance is the concern that piecemeal appellate review will "undermine the ability of district judges to supervise litigation," *Richardson-Merrell*, 105 S. Ct. at 2761, "as well as [undermine] the special role [a district judge] plays in our judicial system." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). The concern for the district judge's ability to supervise cases is heightened in complex cases like this that involve numerous parties and a multitude of difficult issues, particularly when a district court issues an order that is an integral part of its case management scheme.

This Court need not travel on uncharted waters in order to resolve the issue for which certiorari was granted. In *Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519 (1947), this Court concluded that a denial of intervention as of right was immediately appealable because the applicant for intervention could not "appeal from any subsequent order or judgment in the proceeding unless he [did] intervene." *Id.* at 524. It logically follows, therefore, that if an applicant who was denied intervention as of right can appeal from such a denial upon final judgment because the district court granted the applicant's request for permissive intervention, the denial of intervention as of right is not immediately appealable.[2]

[2] Respondents attempt to reach the opposite result by relying upon the conclusion from *Brotherhood* that "where a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying intervention becomes appealable." 331 U.S. at 524. But respondents rely upon *Brotherhood*'s conclusion without referring to the underlying rationale, which is that an applicant for intervention as of right can appeal immediately from a denial of intervention because upon

Once a party has been granted intervention, whether as of right pursuant to Fed. R. Civ. P. 24(a) or by permission pursuant to Fed. R. Civ. P. 24(b), the intervenor can participate in the action subject only to the conditions imposed by the district court upon granting intervention. *See* Fed. R. Civ. P. 24(b) and 24(a) advisory committee note; 7C C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1920, at 488 (2d ed. 1986). Respondents have not attempted to argue that they would be entitled to an immediate appeal of the denial of intervention as of right had the district court granted them permissive intervention without imposing any conditions limiting the extent of their participation in the action. Respondents' argument, therefore, boils down to the proposition that an intervenor who is dissatisfied with conditions that are imposed by a district judge to promote the "efficient conduct of the proceedings", *see* Fed. R. Civ. P. 24(a) advisory committee note, or to prevent undue delay and prejudice to the rights of the original parties, *see* Fed. R. Civ. P. 24(b), should be permitted to appeal immediately the imposition of such conditions. Such a proposition is unacceptable and plainly contrary to the purposes of the final judgment rule.

In a practical sense, the imposition of conditions by a district court on an intervenor are identical to district court orders limiting discovery or dismissing claims, which generally are not immediately appealable. *See, e.g.*, Fed. R. Civ. P. 54(b); *Firestone*, 449 U.S. at 377; *Douglas Oil Co. v.*

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entry of final judgment the applicant, as a non-party, would not be able to appeal the denial. The result reached in *Brotherhood* is unnecessary and inappropriate in this case because respondents have been granted permissive intervention and, therefore, can appeal from the denial of intervention as of right upon entry of final judgment.

Petrol Stops Northwest, 441 U.S. 211, 232 (1979) (Rehnquist, J., concurring); *Boreri v. Fiat S.P.A.*, 763 F.2d 17, 21 (1st Cir. 1985); *Arango v. Guzman Travel Advisors*, 761 F.2d 1527, 1530 (11th Cir.), *cert. denied*, 106 S. Ct. 408 (1985). As the government has already argued, an intervenor should be required to "comply with the same rules governing appellate review of district court orders that apply to the original parties to the case." (Supp. Brief of U.S. 29) *Cf. Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978) (appealability of order in class action determined by same standards governing other types of litigation). An intervenor who is disgruntled with conditions imposed by a district judge upon intervention is no different from a party who is disgruntled by case management orders, discovery orders, or partial dismissals — all such parties (including respondents here) have the right to seek appellate review upon entry of final judgment and should not be permitted to pursue multiple, piecemeal appeals.

A. The District Court's Order Is Not Immediately Appealable as an Effective Denial of Intervention

Respondents urge this Court to give the final judgment rule a "practical" construction, by arguing that the effect of the district court's order was to deny intervention, and, therefore, that immediate appeal from the order is warranted. There are at least two significant flaws in respondents' argument. First, the "effect" of the district court's order was not a denial of intervention because respondents were in fact granted leave to intervene and have actually intervened in the underlying action. The order permitted them to file a complaint on the same issues raised by the governments and the cross-complainants, to attend

all depositions, to conduct discovery subject to appropriate conditions, and to participate fully in the formulation of a remedial scheme. Therefore, the grant of leave to intervene permissively enabled respondents to participate in the action in a meaningful fashion.

Even if respondents could demonstrate that the conditions imposed by the district court prevented them "from achieving the essential objectives for which intervention was sought" (Brief of Resps. 14), the critical fact remains that respondents can appeal upon entry of final judgment in this action and obtain review of the conditions imposed by the district court, just as a party who is dissatisfied with a court order limiting discovery or dismissing a claim can appeal from such an order upon entry of final judgment. As this Court recognized in *Brotherhood*, the ability to appeal an order denying intervention as of right upon entry of final judgment precludes the finding of "the degree of definitiveness which supports an [interlocutory] appeal therefrom." 331 U.S. at 524.

A second flaw in respondents' argument stems from the fact that they are, in essence, seeking to appeal from the specific conditions imposed by the district court upon granting intervention. This fact is evidenced by respondents' argument that the conditions imposed by the district court amounted to a "practical" denial of intervention. This Court, however, has emphasized repeatedly that "[a]ppeal rights cannot depend on the facts of a particular case. The Congress necessarily has had to draw the jurisdictional statutes in terms of categories." *Carroll v. United States*, 354 U.S. 394, 405 (1957); *see United States v. MacDonald*, 435 U.S. 850, 857 n.6 (1978) (factual circumstances cannot establish independent appealability prior to final judgment).

By way of example, in *Carroll*, this Court rejected an interlocutory appeal from an order suppressing evidence even though the "practical" effect of the order was a dismissal of the indictment for lack of evidence. The Court reasoned that dismissal was not "a necessary result of a suppression order relating to particular items of evidence, nor . . . the result in practice *in the generality of cases*." 354 U.S. at 405 (emphasis added).

Once again, even if respondents could demonstrate that the district court's imposition of conditions effectively precluded them from obtaining the objective for which they sought to intervene, that clearly is not the result in the "generality of cases" in which a district court has imposed conditions upon granting a party intervenor status. The extent and degree of conditions imposed by a district court upon granting a party's request to intervene can vary tremendously based on the complexity and needs of the particular case. Allowing the courts of appeals to examine, for the purpose of determining appealability, the facts in a particular case and he potential impact of conditions imposed by a district court upon intervenors would, in a very real sense, permit the courts of appeals to draw jurisdictional lines based on whether, "in their discretion, it appeared necessary to avoid unfairness in the particular case." *Coopers*, 437 U.S. at 474 n.24. Such "indiscriminate interlocutory review" by courts of appeals of a district court's order imposing conditions on intervenors would, as this Court recognized in rejecting the "death knell" doctrine in the class action context, run afoul of the principle that "the discretionary power to permit an interlocutory appeal is not, in the first instance, vested in the courts of appeals." *Id.* at 474; *see also Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7-10 (1980) (discussing district courts' discretion under Fed. R. Civ. P. 54(b)).

Regardless of whatever "practical" effects respondents can point to in this case, a district court's order denying intervention as of right but granting permissive intervention subject to conditions is not an appropriate "category" of interlocutory order to warrant immediate appeal.

B. The District Court's Order Is Not an Immediately Appealable Collateral Order

Respondents contend that the district court's order denying intervention as of right but granting permissive intervention is immediately appealable pursuant to the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Although petitioners continue to believe that respondents have failed to meet the first two prongs of the *Cohen* test,[3] it is clear that the third

[3] The first prong of the *Cohen* test requires that "the order must conclusively determine the disputed question." *Coopers & Lybrand v. Livesay*, 437 U.S. 464, 468 (1978). In *Coopers & Lybrand*, this Court concluded that an order addressing a request for class certification did not meet the first prong of the *Cohen* test because "such an order [was] subject to revision in the District Court." *Id.* at 469; *see also Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 380-81 (1981) (Rehnquist, J., concurring) (first prong not met because motion for disqualification of counsel can be reconsidered by district court). Respondents maintain that this prong of the *Cohen* test has been satisfied because there is no basis to conclude that the district judge contemplated reconsidering its order denying intervention as of right. Respondents' argument ignores the fact that they are relying on the allegedly improper scope of the conditions imposed on them as permissive intervenors to meet the "effectively unreviewable on appeal from final judgment" prong of the *Cohen* test. If the district court had not imposed any conditions on respondents as permissive intervenors, respondents would have no basis to demonstrate an alleged irretrievable loss of rights. The conditions, therefore, are critical to respondents' claim that the *Cohen* test has been satisfied and it is this element of the district court's order that may be subject to reconsideration. For example, if respondents were able to demonstrate that the conditions unduly restricted them from asserting appropriate claims, or that petitioners and the governments were acting unreasonably in withholding consent to necessary discovery efforts and other motions, the district court could revise the conditions it imposed upon intervention to reflect the realities at hand. Consequently, in light of the possibility that the district court could reconsider the conditions it imposed, respondents have failed to meet the first prong of the *Cohen* test.

The second prong of the *Cohen* test requires that the order must "resolve an important issue completely separate from the merits of the action." *Coopers & Lybrand*, 437 U.S. at 468. Respondents contend that this prong has been met because the right to intervene is separable from and collateral to the merits. Again, respondents ignore the fact that the nature of the conditions imposed by the district court are essential to their argument that the third prong of the *Cohen* test has been met. The only harm that respondents suggest they will suffer if they are not permitted to pursue an interlocutory appeal from the denial of their motion to intervene as of right stems from the conditions imposed by the district court upon granting permissive intervention. But the propriety of such conditions "will often be difficult to assess until [their] impact on the underlying litigation may be evaluated, which is normally only after final judgment." *Firestone*, 449 U.S. at 377 (referring to denial of motion to disqualify counsel); *Cf. Richardson-Merrell v. Koller*, 105 S. Ct. 2757, 2764-65 (1985) (no immediate appeal from order disqualifying counsel in civil action because if prejudice is not required the third prong of *Cohen* is not met and if prejudice is required then the second prong is not met); *United States v. MacDonald*, 435 U.S. 850, 858-59 (1978) (prejudice caused by denial of motion to dismiss based on right to speedy trial is speculative until after trial). Respondents specifically refer to the need to demonstrate on appeal that they were prejudiced by the disctrict court's denial of intervention as of right and grant of permissive intervention, (Brief of Resps. 30), which would appear to fall squarely within the rule of *Richardson-Merrell* and *MacDonald*. Therefore, the second prong of the *Cohen* test also has not been satisfied.

prong of the test, which requires that the order be

effectively unreviewable on appeal from final judgment, has not been satisfied.

Respondents rely on language from *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), to transform the third prong of the *Cohen* test into the general proposition that an immediate appeal should be permitted if the danger of denying justice by delay outweighs the inconvenience and costs of piecemeal review. They then argue that time is of the essence in this particular case because it involves the cleanup of a waste disposal site, and, therefore, that the potential harm from delaying review of the district court's order outweighs the potential costs of piecemeal review. Respondents' novel theory as to how they have purportedly satisfied the third prong of the *Cohen* test is wholly unpersuasive.

By advancing their novel theory, respondents are urging this Court to conclude that the third prong of the *Cohen* test is met if, after balancing the involved interests based on the facts of a particular case, an appeal should be permitted as a matter of equity. Respondents' theory is a radical departure from this Court's consistent characterization of the third prong of the *Cohen* test, *see, e.g., Firestone*, 449 U.S. at 376 (third prong requires showing of irreparable harm); *MacDonald*, 435 U.S. at 860 (third prong requires important right that would be irreparably lost), and respondents have cited no authority to support their proposed revision to the *Cohen* standards. In contrast to respondents' unusual theory, the decisions of this Court have simply held that the third prong of the *Cohen* test requires exactly what it says: that the order be "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468. The district court's order denying intervention as of right but granting permissive intervention

in this case plainly does not meet that test because respondents may appeal from the denial of intervention as of right, as well as from any condition that has been imposed by the district court pursuant to the grant of permissive intervention, upon entry of final judgment in the action.

Another troubling aspect of respondents' argument that the third prong of the *Cohen* test has been satisfied is that their argument depends entirely on the supposedly unique circumstances of this particular case. Respondents contend that an immediate appeal from the district court's order is required in this case because this case involves a purported danger of contamination, because they may be precluded in some fashion from challenging any remedial programs that are adopted, because many years may elapse before final judgment is entered, and because the conditions imposed by the district court may hinder respondents' ability to protect their interests. (Brief of Resps. 28-29) Respondents' argument that the allegedly extraordinary nature of this case and the allegedly extreme nature of the conditions imposed by the district court establish the independent appealability of the district court's order is unprecedented and unpersuasive. This Court has concluded on more than one occasion that "[a]ppeal rights cannot depend on the facts of a particular case," *Carroll*, 354 U.S. at 405, regardless of how extraordinary they may appear. *See McDonald*, 435 U.S. at 857 n.6.

To permit the courts of appeals to examine the facts of each case and decide, for example, whether a waste disposal case warrants immediate appeal of interlocutory orders whereas a breach of contract case does not, would defeat Congress's efforts to define final decisions in terms of categories, as well as permit the courts of appeals to

exercise in the first instance the very discretion to hear interlocutory appeals that Congress delegated to the district courts when enacting 28 U.S.C. § 1292(b). *See Coopers & Lybrand*, 437 U.S. at 474-75. Respondents simply have failed to demonstrate that the district court's order satisfied the third prong of the *Cohen* test, and, therefore, immediate appeal from the order was improper.[4]

II. The District Court's Order Granting Respondents Permissive Intervention But Denying Them Intervention as of Right Is Not Immediately Appealable Under 28 U.S.C. § 1292(a)(1)

In an effort to find some other basis to support their argument that they were entitled to immediate review of the district court's interlocutory order, respondents focus on 28 U.S.C. § 1292(a)(1), which provides for an immediate appeal from "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions." The district court's order, however, did not specifically refuse an injunction and, therefore, is not immediately appealable unless it had the "practical effect" of refusing an injunction. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 83 (1981); *cf. General Elec. Co. v. Marvel*

[4] The availability of an immediate appeal from an order granting permissive intervention but denying intervention as of right is not addressed in any respect by the recent amendments to the Comprehensive Environment Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9657. *See* Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986). The posture of this appeal and the issue presented for this Court's review in this proceeding is, therefore, unaffected by SARA.

Rare Metals Co., 287 U.S. 430, 433 (1932). This Court has emphasized that section 1292(a)(1) must be approached "gingerly lest a floodgate be opened that brings into the exception many pretrial orders." *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 482 (1978), *quoting Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966). Consequently, unless respondents can demonstrate that the district court's order "might have a 'serious, perhaps irreparable consequence,' and that the order can be 'effectually challenged' only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory review." *Carson*, 450 U.S. at 84.

A. The District Court's Order Did Not Have the Practical Effect of Denying an Injunction

Respondents acknowledge that the district court's order did not technically constitute the refusal of an injunction. (Brief of Resps. 35-36) Respondents contend, however, that the conditions the district court imposed upon granting their request for permissive intervention amounted to an effective denial of the injunctive relief they hoped to obtain by intervening in the action. Respondents have identified three aspects of the district court's order which they contend demonstrate that the order amounted to an effective denial of an injunction.

Respondents first contend that the district court's order limited the claims for relief that they could assert in the action and therefore prevented them pursuing "additional injunctive relief both broader in scope and different in kind than that sought by the governments." (Brief of Resps. 36-37) This argument ignores the very terms of the district

court's order. The order limited respondents' participation to the issues raised by the parties and did not suggest that they could not request whatever injunctive relief they thought was appropriate. In fact, respondents' complaint in intervention, which was filed pursuant to the district court's grant of permissive intervention, requested the very same injunctive relief that respondents now contend that the district court's order prevented them from pursuing. Moreover, the district court's order did not prevent respondents from asserting claims necessary to their request for injunctive relief.[5] Therefore, the order did not by its

[5] Respondents suggest that the district court's order prevented them from asserting "distinct legal theories" in support of their request for injunctive relief. Respondents have asserted eleven claims in support of the injunctive relief they requested in their complaint in intervention. None of the seven additional claims that respondents outlined in their proposed complaint in intervention, however, constitute distinct legal theories in support of their request for injunctive relief. Four of the additional claims, all of which are being pursued by the governments, were based on the cost recovery provisions of federal and state statutes. (E.R. 149, 155, 160, 161). The district court properly ruled that the cost recovery statutes were intended to reimburse the governments for expenses incurred in cleaning up sites, and, therefore, that respondents did not have standing to pursue such claims. (Pet. App. A-20). The remaining three claims that respondents contend were precluded by the district court's order were damage claims based on negligence, strict liability, and taking of private property. (E.R. 175, 177, 178). It is interesting that, in contrast to all of the other claims asserted in their proposed complaint in intervention, respondents did not indicate textually that the damage claims were intended as distinct legal theories in support of a claim for injunctive relief. It would appear that respondents intended the damage claims to serve as a basis for recovery of the costs of any abatement measures that the district court might have required petitioners to undertake based on respondents' other claims that specifically requested injunctive relief. This conclusion is consistent with respondents' admission that the only purpose for

terms or in practice prevent respondents from requesting any and all injunctive relief that they deemed necessary.

Respondents next contend that the district court's order was a practical denial of an injunction because it allegedly restricted their ability to obtain complete injunctive relief by limiting the parties against whom such relief could be sought. Respondents suggest that the district court's order effectively dismissed all of their claims against the government agencies that respondents allege are the only parties capable of providing certain aspects of the relief that they are seeking. Respondents have, however, ignored both the language of the district court's order and its practical effect.

As indicated previously, the district court's order limited respondents' participation in the action to "the litigation of the issues raised by the original parties." (Pet. App. A-19) The district court never suggested that respondents could not seek injunctive relief against the relevant governmental agencies. To the contrary, the district court specifically noted in its order that the original defendants had filed counterclaims against the governmental agencies that respondents suggest are critical parties to the action. (Pet. App. A-17) The best evidence that the district court's order did not restrict respondents' ability to seek injunctive relief against the necessary governmental agencies is the fact that the complaint in intervention filed by respondents included a prayer for injunctive relief against the United States Air Force, the California Department of Health Services, and the California Water Resources Board — the same governmental agencies that respondents now claim the

asserting the damage claims was "to preserve and protect them from possible waiver" (Brief of Resps. 36 n.31).

district court's order prevented them from including in the action. (E.R. 409-77) Therefore, the district court's order did not have the practical effect of dismissing respondents' claims for injunctive relief against the relevant governmental agencies.

Respondents' final argument is that the conditions imposed by the district court effectively denied them the opportunity to obtain the injunctive relief they desired. Respondents contend that the district court's order prevented them from requesting preliminary or permanent injunctive relief and that it would deny them the opportunity to object to or participate in interim remedial measures at the Stringfellow site. Once again, respondents have misinterpreted or ignored the terms of the district court's order.

The district court did not prevent respondents from requesting preliminary injunctive relief but rather, in an effort efficiently to manage a complex piece of litigation, imposed reasonable conditions upon respondents' participation in the action.[6] As has been previously demonstrated,

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[6] The conditions imposed by the district court did not in any way "settle or even tentatively decide anything about the merits of the claim," *Switzerland Cheese*, 385 U.S. at 193, but rather "relat[ed] to pretrial procedures," which this Court has stated are not " 'interlocutory' within the meaning of § 1292(a)(1)." *Id.*; *see also Gardner*, 437 U.S. at 2453 & n.7 (order denying class certification is not immediately appealable because it did not pass on merits of claim and related primarily to convenience in litigation, which does not present as great of a risk of irreparable harm); *Kartell v. Blue Shield*, 687 F.2d 543, 554 (1st Cir. 1982) (order denying intervention as of right but granting permissive intervention is not immediately appealable because it "falls squarely within the category of discretionary orders which control the scope of the action" and does not "hold on the merits that injunctive relief [is] inappropriate." *Id.*

the district court's order did not prevent respondents from seeking all of the injunctive relief they desired against all of the parties they identified in their proposed complaint in intervention. Furthermore, nothing in the district court's order prevented respondents from requesting, subject to appropriate conditions, any form of preliminary injunctive relief that might be necessary. Most importantly, if and when the district court considers proposed interim relief measures, respondents will be able to participate fully and argue forcefully in favor of or in opposition to any particular interim remedial measure. Respondents simply are incorrect in asserting that they will be unable to object to any aspect of an interim program agreed to by the original parties to this action. Consequently, respondents have failed to demonstrate that the district court's order amounted to a practical denial of an injunction within the meaning of *Carson*.

B. The District Court's Order Will Not Have Serious or Irreparable Consequences and Can Be Effectually Challenged Upon Appeal from Final Judgment

In *Carson*, this Court emphasized that the general congressional policy against piecemeal review of interlocutory orders requires that immediate review even of an interlocutory order that has the practical effect of refusing an injunction be refused unless the order "might have a 'serious, perhaps irreparable, consequence,' and . . . the order can be 'effectually challenged' only by immediate appeal." 450 U.S. at 84. Even if respondents could somehow demonstrate that the practical effect of the district court's order was to refuse an injunction (and they have thus far

failed to do so), the court of appeals still would lack jurisdiction over an immediate appeal from the order in question because the order does not meet the two additional requirements for an interlocutory appeal identified in *Carson*.

Respondents argue that the two-prong test of *Carson* is satisfied because the conditions imposed by the district court upon granting intervention prevented them from obtaining the injunctive relief they sought. As has been previously demonstrated, however, the district court's order did no such thing. Respondents have been permitted to request the very same injunctive relief against the very same parties that respondents first requested and identified in their proposed complaint in intervention.[7] Respondents' unfounded conjectures as to how they might be affected by the conditions imposed by the district court do not satisfy the irreparable consequences or effectually unreviewable requirements of *Carson*. *Cf*. *Firestone*, 449 U.S. at 376 (petitioner's suggestions that proceeding may be tainted or indelibly shaped absent immediate review of order does not satisfy the effectively unreviewable on appeal standard). Respondents have not and cannot point to a single avenue

[7] Respondents did not request preliminary injunctive relief in their complaint in intervention and have not made any effort to request such relief as of the date of the filing of this brief. In fact, as the Seventh Circuit recognized in *Brown v. Kerr McGee Chemical Corp.*, 767 F.2d 1234, 1240 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1378 (1986), preliminary injunctive relief would not be appropriate in this case because the Stringfellow site is not operational. A number of circuit courts have concluded that the failure to request preliminary injunctive relief is a strong indication that no immediate review is needed in order to avoid an irreparable harm. *See e.g., United States v. Wade*, 713 F.2d 49, 53 (3d Cir. 1983); *Plymouth County Nuclear Information Comm. v. Boston Edison Co.*, 655 F.2d 15, 18 (1st Cir. 1981).

of injunctive relief that has been foreclosed to them as a result of the district court's order.[8] Moreover, the governments have actively asserted injunctive relief claims against the original defendants and assert the right to obtain injunctive relief for whatever actions may be necessary to eliminate any possibility of a threat to local residents.[9] More importantly, respondents, by virtue of their involvement in the case as interventors, will be able to participate fully in the formulation of any interim or long-term remedial plan and, in that context, will be able to urge a broadening or refinement of any injunctive relief sought by the governments.

In a similar fashion, the second prong of *Carson* (requiring that an order be "effectually challenged" only by immediate appeal) is not satisfied because respondents can appeal both from the conditions imposed by the district court and the specifics of any remedial plan approved by the district court upon entry of final judgment. Therefore, the district court's order granting respondents' permissive

[8] Respondents' reliance on *Brown v. Kerr McGee Chemical Corp.*, 767 F.2d 1234 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1378 (1986) is misplaced. In *Brown*, contrary to this case, it appears that no government plaintiff was seeking, on behalf of Brown and other citizens, the essential clean-up remedies that would have prevented further risk of toxic contamination. More importantly, in *Brown*, the district court granted partial summary judgment dismissing Brown's request that the wastes be removed from the property. *Id*. at 1237. Here, the district court has not ruled on any of respondents' requests for permanent injunctive relief.

[9] Although respondents have alleged generally that the relief they seek is broader than that sought by the governments, respondents have not suggested that the governments will not seek whatever injunctive relief is necessary in order to protect the health, welfare, and property of the local residents.

intervention but denying them intervention as of right is not immediately appealable pursuant to 28 U.S.C. § 1292(a)(1).

CONCLUSION

The judgment of the Ninth Circuit should be vacated and the action remanded to the Ninth Circuit, with instructions to dismiss the appeal for want of jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX

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